Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICHAEL PEREZ,

Petitioner,

v.

MIAMI-DADE COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PETER W. BELLAS
GENOVESE JOBLOVE & BATTISTA, P.A.
Bank of America Tower
100 Southeast Second Street, 36th Floor
Miami, Florida 33131
(305) 349-2300

Attorneys for Petitioner

177590

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTION PRESENTED

The United States District Court entered summary judgment based upon admissions resulting from Respondent's repeated failure to respond to Petitioner's Requests for Admissions. The district court subsequently denied Respondent's motion to withdraw its admissions. Respondent's motion was filed after the entry of summary judgment and after the time allowed by the district court's scheduling order. In denying Respondent's motion, the district court found that Respondent had engaged in "deceptive" and "misleading" litigation practices, "utterly neglected" the case since its inception, and "flagrantly disregarded" the Federal Rules of Civil Procedure.

The Eleventh Circuit reversed. Although it did not disturb the district court's factual findings, the Eleventh Circuit held that the district court abused its discretion by not allowing Respondent to withdraw its admissions. The Eleventh Circuit held that the district court was required to allow Respondent to withdraw its admissions where the Eleventh Circuit determined on appeal that the presentation of the merits of the action would be subserved and that there would be no prejudice to Petitioner.

The question presented is whether the permissive language of Rule 36(b) of the Federal Rules of Civil Procedure grants district courts the discretion to deny a motion to withdraw admissions filed after the entry of summary judgment and the Rule 16 motion cutoff and where the moving party has engaged in "deceptive" and "misleading" litigation practices and "flagrantly" disregarded the Federal Rules of Civil Procedure.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Federal Rule Involved in this Case	1
Statement of the Case	4
Reasons for Granting the Writ	11
Certiorari Is Warranted Because the Decision Below Conflicts with Decisions of Other Circuits as Well as the Rules of Construction of This Court and Rule 36(b)	12
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Acosta v. Louisiana Dep't of Health & Human Res., 478 U.S. 251 (1986) 12

Anderson v. Yungkau, 329 U.S. 482 (1947) 13

BAW Mfg. Co. v. Saks Fifth Ave. Ltd., 547 F.2d 928 (5th Cir. 1977) 20

Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 137 F.3d 1293 (11th Cir. 1998) 13

Carlisle v. United States, 517 U.S. 416 (1996) 16-17

Carney v. IRS, 258 F.3d 415 (5th Cir. 2001) 12, 14

Donovan v. Carls Drug Co., 703 F.2d 650 (2d Cir. 1983) 12, 13, 14

Dredge v. Kendrick, 849 F.2d 1398 (11th Cir. 1988) ... 19

Dukes v. South Carolina Insurance Co., 770 F.2d 545 (5th Cir. 1985) 12, 14, 15

Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990) 19, 20

JD Pharmaceutical Distribs. Inc. v. Save-On Drugs & Cosmetics Corp., 893 F.2d 1201 (11th Cir. 1990) 15, 17

Cited Authorities

	Page
Johnson v. Mammoth Recreations, Inc., 975 F.2d 604 (9th Cir. 1992)	19
McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988)	12
Smith v. First Nat'l Bank, 837 F.2d 1575 (11th Cir. 1988)	18
Sosa v. Airprint Sys., Inc., 133 F.3d 1417 (11th Cir. 1998)	19
Stubbs v. IRS, 797 F.2d 936 (11th Cir. 1986)	17
Statutes:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2072(a)	13
Rules:	
Federal Rule of Civil Procedure 36	*passim*
Federal Rule of Civil Procedure 36(a)	11, 16, 17
Federal Rule of Civil Procedure 36(b)	*passim*
Federal Rules of Civil Procedure 56	18
S.D. Fla. L.R. 26.1(F)	17

Cited Authorities

Page

S.D. Fla. L.R. 26.1(F)(3) 17

U.S. Supreme Court Rule 13.1 1

Other Authority:

8A Charles Alan Wright, Arthur R. Miller & Richard L. Markus, Federal Practice and Procedure § 2256 (1994) 16

TABLE OF APPENDICES

Page

Appendix A — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Dated And Filed September 20, 2002 ..... 1a

Appendix B — Opinion Of The United States Court Of Appeals For The Eleventh Circuit Dated And Filed July 17, 2002 ..... 3a

Appendix C — Order Granting Summary Judgment As To Liability In Favor Of Plaintiff And Setting Trial On Damages Of The United States District Court For The Southern District Of Florida Dated April 8, 1998 And Filed April 9, 1998 ..... 34a

Appendix D — Order Of The United States District Court For The Southern District Of Florida Dated April 8, 1998 And Filed April 9, 1998 ..... 47a

Appendix E — Final Judgment Of The United States District Court For The Southern District Of Florida, Miami Division Dated May 27, 1998 .. 69a

Appendix F — Order Setting Pre-trial Conference And Trial Date Of The United States District Court For The Southern District Of Florida Filed October 14, 1997 ..... 71a

Petitioner respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The district court's orders (per King, D.J.) granting summary judgment (Appendix ("Pet. App.") 34a-46a)[1] and denying motions for reconsideration (Pet. App. 47a-68a) are unpublished. The court of appeals' opinion (per Tjoflat, J., joined by Marcus and Bright, J.J.) reversing (Pet. App. 3a-33a) is published at 297 F.3d 1255. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 1a-2a) is published at 49 Fed. Appx. 291.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on July 17, 2002, and denied rehearing and rehearing en banc on September 20, 2002. Pursuant to Rule 13.1 of this Court, Petitioner has filed this petition within 90 days of the denial of rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED IN THIS CASE

Rule 36 of the Federal Rules of Civil Procedure, as amended in 1993, provides:

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1. Citations to the record refer to either the Petitioner's Appendix (Pet. App.) or to the volume, docket entry, and page number of the record as compiled by the clerk of the district court (e.g., R2-62-1).

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, when good faith requires that a party qualify an answer or deny only a part of

the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits

> withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

STATEMENT OF THE CASE

This case arises from an incident in which Petitioner was maliciously run over by Respondent's former co-defendant, Sergeant William Alsbury,[2] on March 24, 1995. (R12-345; R2-61-5). As a result, Petitioner suffered significant injuries. Alsbury, a known racist police officer, believed that Petitioner was an African-American suspect and tried to apprehend him by running him down with his police vehicle. (R11-102; 2SR1-113-14; 2SR2-347-48; R2-61-5). Petitioner was in plain clothes and also was in pursuit of the suspect. When Petitioner reported what had happened, Respondent threatened and retaliated against him.

Accordingly, on June 19, 1997, Petitioner filed this action against both Respondent and Alsbury. (R1-1). Together with

2. Petitioner will utilize the same spelling of "Alsbury" that appears on his death certificate. (R4-149). Albury died while this matter was on appeal to the Eleventh Circuit thereby making a key witness unavailable in the event this matter is re-tried.

the Complaint, Petitioner served requests for admissions on Respondent, which consisted of 40 admissions. (Pet. App. 49a). Respondent answered the Complaint and asserted various affirmative defenses, but did not respond to the requests for admissions. (Pet. App. 49a; R1-4).

September 12, 1997 Scheduling Conference

On September 12, 1997, the district court held a scheduling conference. At the scheduling conference, Respondent's lawyer claimed that he did not receive Petitioner's discovery even though it had been served with the Complaint. (R1-7-10). Petitioner's counsel agreed to serve it a second time. At the conclusion of the scheduling conference, the district court warned the parties that they were required to comply with the discovery and the motion cutoffs:

> [T]he dates we pick today will be absolutely *etched in concrete*. You can rely on it. . . . My promise to you is that when we put you on that two week calendar, you will be tried in that two week period. . . .
>
> [S]o when it comes up to pretrial, guys, *get your discovery done and get ready*.

(R1-7-11-12) (emphasis added). Following the hearing, the district court entered its scheduling order, which set the motion and discovery cutoffs. (Pet. App. 71a-73a). The district court ordered that the parties "shall abide by the [district court's scheduling order] under penalty of *dismissal or other sanctions*." (*Id.* at 71a) (emphasis added).

Second and Third Requests for Admissions

On October 3, 1997, Petitioner served another set of requests for admissions. (*Id.* at 49a). Respondent again "failed to respond to the second request for admissions" and failed to produce requested documents as well as witnesses for deposition. (*Id.*) "On January 6, 1998, [Petitioner's] counsel re-served the October 3rd discovery requests, including the second request for admissions. The second request for admissions [was] stamped 'Received by Dade County Attorney, January 6, 1998'" (*Id.*).

Motion to Compel

On January 27, 1998, Petitioner filed a motion to compel production of documents. (R1-10). In the motion, Petitioner outlined Respondent's discovery abuses and failures and advised the district court that the Respondent's "refusal to participate in discovery is *prejudicing* [his] ability to present his claims." (R1-10-4) (emphasis added).

Motion for Summary Judgment

On January 30, 1998, Petitioner filed a motion for summary judgment on Count I of the Complaint, which was premised on Respondent's repeated failure to respond to the various requests for admissions. As the district court found:

> On February 3, 1998, [Respondent] finally responded to the first request for admission, over six months after it was served. In that response, [Respondent] stated that [it] received the first request on January 6, 1998. . . . However, nothing

> in the record indicates that the first request for admissions was served on any other date but June 25, 1997.

(Pet. App. 49a-50a).

February 20, 1998 Pretrial Conference

In an attempt to defeat Petitioner's motion for summary judgment, Respondent misrepresented to the district court at the pretrial conference that Alsbury's deposition had been taken when it had not. (Pet. App. 55a-59a; R5-58-16-21). This was the same person whom Respondent had refused to produce for deposition.

Given Respondent's repeated failure to timely respond to Petitioner's requests for admissions and its misrepresentation to the court, the district court announced at the pretrial conference that various of the requests were deemed admitted and orally granted the motion for summary judgment. (R1-25). The district court entered a written order granting the motion for summary judgment as to Count I of the complaint after the hearing. (R2-28).

Respondent's Late Motion

Eight months after the requests for admissions were initially served, approximately a month after the motion cutoff, and six days after the district court's entry of summary judgment, Respondent finally filed a motion to withdraw the admissions. (R1-30). Respondent never requested that the district court amend its scheduling order to allow it to file its motion out of time.

Second Order Granting Summary Judgment and Order Denying Motion for Reconsideration

On April 8, 1998, the district court entered another order granting summary judgment and denied Respondent's motion for reconsideration. (Pet. App. 34a; *id.* at 47a). In its order denying Respondent's motion for reconsideration, the district court referred back to its scheduling order warning that the parties "shall abide" by the court's schedule "under penalty of dismissal or other sanctions." (*Id.* at 48a).

The district court found that Respondent repeatedly failed to respond to Petitioner's request for admissions, failed to timely produce documents, and failed to produce witnesses. (Pet. App. 49a). The court also found that Respondent violated the court's scheduling order regarding the completion of discovery. (*Id.* at 50a).

The district court also recounted the circumstances of the court's entry of summary judgment at the pretrial conference. First, Respondent failed to ensure that the court file had a copy of Respondent's response to Petitioner's motion for summary judgment. (*Id.* at 55a). Second, Respondent's attorney arrived thirty minutes late for the pretrial conference (*Id.*). Third, Respondent's response to the motion for summary judgment was "devoid of any other evidence contesting the matters conclusively established by the admissions." (*Id.*; *see also id.* at 62a (Respondent "failed to provide the Court with any evidence whatsoever to contradict the matters admitted by [Respondent]")). Fourth, even if Respondent had timely responded to the requests for admissions, various of the late responses did not comply with the requirements of Rule 36 and, accordingly, "still would

have [been] admitted." (*Id.* at 49a n.1). Finally, the district court determined that Respondent had made a misrepresentation to the court. (*Id.* at 55a-58a).

Based on these factual findings, the district court concluded that Respondent litigated in a "deceptive" and "misleading" manner, was "disingenuous" with the court, and exhibited an "utter neglect of this case and flagrant disregard for the Federal Rules of Civil Procedure for over seven months." (*Id.* at 56a, 59a n.5, 61a, 63a). Accordingly, the district court reaffirmed the entry of summary judgment based on the admissions and scheduled a trial on damages only. (*Id.* at 34a).

The Jury Trial

After a four day trial, the jury entered its verdict and awarded damages in favor of Petitioner and against Respondent. During the trial, Respondent, Petitioner, and Alsbury stipulated to the dismissal of Alsbury without prejudice and a tolling of the statute of limitations in the event of any re-trial of this matter. (R13-481-484). The district court entered a Final Judgment on May 27, 1998. (Pet. App. 69a).

Respondent's First Appeal

Respondent appealed. (R4-117). Its Initial Brief set forth a prescient example of prejudice that would preclude a party from withdrawing admissions: the unavailability of a key witness. Respondent's Initial Brief in Appeal No. 98-5075 at 28. Ironically, Petitioner later discovered that the central figure in this case, Alsbury, died on December 19, 1999 — just three months after Respondent set forth its example of

prejudice in its initial brief. (R4-149). Neither Respondent nor Respondent's attorneys, who had represented Alsbury, advised either the district court or Petitioner that Alsbury had died.

On March 1, 2001, the Eleventh Circuit held that it did not have jurisdiction to consider Respondent's appeal. (R4-143). On remand, the district court entered judgment in favor of Respondent with respect to Counts 4, 5, and 6 of the Complaint. (R5-178). The district court, however, ratified its earlier determination that Respondent should not be allowed to withdraw its admissions. (R5-178-6-7). The district court entered a second Final Judgment on August 22, 2001, and reaffirmed the May 27, 1998 Final Judgment as it related to the jury's verdict in favor of Petitioner as to Count I of the Complaint. (R5-179)

Second Appeal

In the second appeal of this matter, the Eleventh Circuit reversed the district court's denial of Respondent's motion to withdraw admissions as well as the order granting summary judgment as to liability. (Pet. App. 3a). The court of appeals held that district courts "must abide by the two-part test of Rule 36(b)." (*Id.* at 23a). In doing so, the court of appeals found, for the first time on appeal, that the presentation of the merits of the action would be subserved and that there would be no prejudice to Petitioner by allowing Respondent to withdraw its admissions notwithstanding its untimely motion. (*Id.* at 24a-29a).

The court of appeals rejected Petitioner's argument that the "two-part test" of Rule 36(b) was permissive such that it does not compel a court to allow a party to withdraw

admissions under any circumstances once a party fails to timely respond. The court of appeals reversed the district court notwithstanding the latter court's finding that Respondent repeatedly failed to respond to discovery, litigated in a "deceptive" and "misleading" manner and exhibited "utter neglect" for the case and "flagrant disregard" for the Federal Rules of Civil Procedure. Indeed, the Eleventh Circuit did not disturb any of these findings.

REASONS FOR GRANTING THE WRIT

The petition should be granted, because the decision of the Eleventh Circuit is in direct conflict with opinions of the Second and Fifth Circuits, the rules of construction of this Court, and the plain meaning of Rule 36(b). The Eleventh Circuit has re-written Rule 36(b) to eliminate the discretion that the rule affords district courts to enforce admissions with respect to parties who fail to comply with Rule 36(a) by not timely responding to requests for admission.

The desirability of vesting discretion in district courts to determine whether to allow a party to withdraw admissions pursuant to Rule 36(b) is amply illustrated by this case. Where a party engages in "deceptive" and "misleading" litigation practices, exhibits "utter neglect" for the case and "flagrant disregard" for the Federal Rules of Civil Procedure, district courts should be afforded the discretion to enforce admissions. This is especially so where the party who repeatedly failed to respond to requests for admissions waits to file a motion to withdraw its admissions until after the entry of summary judgment and the motion cutoff.

Certiorari Is Warranted Because the Decision Below Conflicts with Decisions of Other Circuits as Well as the Rules of Construction of This Court and Rule 36(b)

Rule 36(b) of the Federal Rules of Civil Procedure specifically provides that a district court "may" (not "shall") permit withdrawal of admissions if certain enumerated factors are met. The permissive language of Rule 36(b) affords district courts broad discretion to determine whether a party may be allowed to withdraw admissions resulting from the failure to respond to a request for admissions. Notwithstanding the clear language of Rule 36(b), the Eleventh Circuit has re-written the rule to substitute the word "shall" for "may" and thereby restrict district courts in their enforcement of properly obtained admissions.

The Eleventh Circuit's opinion directly conflicts with, *inter alia*, this Court's rules of construction as well as the Second Circuit's opinion in *Donovan v. Carls Drug Co.*, 703 F.2d 650, 652 (2d Cir. 1983),[3] and the Fifth Circuit's opinions in *Carney v. IRS*, 258 F.3d 415, 420 (5th Cir. 2001), and *Dukes v. South Carolina Insurance Co.*, 770 F.2d 545, 548-49 (5th Cir. 1985). Given the conflicting interpretations of Rule 36(b), a Writ of Certiorari is appropriate to resolve this conflict. *Acosta v. Louisiana Dep't of Health & Human Res.*, 478 U.S. 251, 253 (1986).

The pertinent portion of Rule 36 provides that a court may permit a party to withdraw admissions only when the

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3. In *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 134 (1988), this Court rejected the application of the *Donovan* court and other courts of the "*Jiffy June*" standard of willfulness with respect to an employer's awareness of the application of the FLSA. This Court, however, did not disturb the Second Circuit's holding that Rule 36(b) is permissive.

presentation of the merits would be subserved and there is no prejudice to the opposing party:

> Subject to Rule 16 . . . , the court *may* permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that the withdrawal or amendment will prejudice that party in maintaining the action on the merits.

Fed. R. Civ. P. 36(b) (emphasis added). Accordingly, when this Court prescribed Rule 36(b) pursuant to the Rules Enabling Act, it chose the permissive word "may" rather than the mandatory "shall" that is used elsewhere in the rule. 28 U.S.C. § 2072(a).

In construing the meaning of the word "may", this Court has held that "when the same Rule uses both 'may' and 'shall', the normal inference is that each is used in its usual sense — the one act being permissive, and the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947); *see also Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1298 (11th Cir. 1998) (same). Rule 36 utilizes the word "shall" seven times and the word "may" twelve times. Consistent with this Court's rules of construction, the use of the word "may" in the applicable portion of Rule 36(b) only may be construed as being "permissive" rather than the "mandatory" meaning given to it by the Eleventh Circuit.

Such a construction not only is consistent with this Court's rules of construction, it is consistent with the better reasoned authority that interprets Rule 36(b) to be permissive and allows district courts the discretion that the language of the Rule affords. In *Donovan*, the Second Circuit held that,

"[b]ecause the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking the exception to the rule." *Donovan*, 703 F.2d 650 at 652 (emphasis added). As the Second Circuit explained, "[v]esting such power in the district court is essential for Rule 36 admissions effectively to narrow issues and speed the resolution of claims." *Id.*

The Fifth Circuit also has held that district courts are not required to allow a party to withdraw admissions even where the two-part test of Rule 36(b) is met. In *Carney*, the Fifth Circuit held that: "Even when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission." 258 F.3d at 419.[4] The Fifth Circuit explained: "For Rule 36 to be effective in this regard, litigants must be able to rely on the fact that matters deemed admitted will not later be subject to challenge." *Id.* (citations omitted).

Similarly, the Fifth Circuit in *Dukes* refused to consider a party's argument that no prejudice resulted from the failure to timely respond to requests for admissions. 770 F.2d 545. In holding that the district court did not abuse its discretion

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4. The Eleventh Circuit dismissed the Fifth Circuit's opinion in *Carney* as *dictum*. (Pet. App. 22a n.25). The Fifth Circuit, however, held that its ruling would be the same even if it were to treat the one party's motion to compel as a "motion for leave to withdraw the deemed admissions." *Carney*, 258 F.3d at 420. Moreover, the Fifth Circuit held that the "failure to move . . . to withdraw the admissions prior to or concurrently with [the other party's] motion for summary judgment simply compels affirmance of the grant of summary judgment." *Id.* at 421. Indeed, Respondent here also failed to request that the district court withdraw its admissions prior to the entry of summary judgment.

in striking the untimely response, the Fifth Circuit emphasized that courts should have the power to control discovery:

> The district court correctly rejected those arguments. The control of discovery is committed to the sound discretion of the trial court. The court found that Dukes and Barber had been evasive and dilatory throughout the litigation.

Id. at 548-49.

Indeed, prior to its opinion in this case, the Eleventh Circuit afforded district courts the same discretion that it now rejects. In a case that is substantially similar to this matter, *JD Pharmaceutical Distribs. Inc. v. Save-On Drugs & Cosmetics Corp.*, 893 F.2d 1201 (11th Cir. 1990), the Eleventh Circuit affirmed the district court's refusal to allow a defendant to withdraw deemed admissions where the defendant "had engaged in dilatory tactics and had disregarded court rules." *Id.* at 1209. The requests "sought admissions as to all material averments of the complaint." *Id.* at 1205. Based on the defendant's failure to respond to these admissions, which tracked the allegations of the complaint, the district court entered summary judgment notwithstanding the defendant's previous answer to the complaint. *Id.* at 1204, 1206. In affirming the district court, the Eleventh Circuit did not substitute its discretion for that of the district court. It did not consider whether the permissive factors in Rule 36(b) should require that the defendant be allowed to withdraw its default admissions. Rather, the court emphasized that the "district court was justified in determining that [defendant's] failure to respond to the requests for admission was a function of [defendant's] decision to seek to delay the litigation." *Id.* at 1209.

The district court here similarly found that Respondent litigated this case in a "deceptive" and "misleading" manner and exhibited "utter neglect" for the case and "flagrant disgregard" for the Federal Rules of Civil Procedure. (Pet. App. 56a, 59a n.5, 63a). Moreover, the court found that Respondent had lied to it. (*Id.* at 56a-58a). The court of appeals did not disturb the district court's findings in this regard. Instead, it holds that, notwithstanding Respondent's "deceptive" and "misleading" litigation practices and "flagrant disregard " for the rules, the district court should have allowed Respondent to withdraw its admissions — even after the entry of summary judgment and the Rule 16 motion cutoff. It reaches this conclusion by improperly reading the word "shall" instead of "may" in Rule 36(b) and holding that the district court "must abide by the two part test of Rule 36(b)."[5] (Pet. App. 23a). *Cf. Carlisle v. United States*,

5. The Eleventh Circuit also criticized Petitioner for propounding requests that tracked the allegations of the complaint. The Eleventh Circuit's conclusion is contrary to Rule 36 and its own precedent. "An answer . . . is . . . the only proper response if a party considers that it has been asked to admit something that it disputes." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Markus, Federal Practice and Procedure § 2256 (1994). Indeed, Rule 36(a) specifically provides that a party may not object on the basis that a request for admission "presents a genuine issue for trial." Fed. R. Civ. P. 36(a). In this regard, the Advisory Committee Notes to the 1970 amendment of Rule 36(a) clearly reject the Eleventh Circuit's holding that requests for admissions cannot relate to matters that one party considers to be in dispute:

> Courts have also divided on whether an answering party may properly object to request for admission as to matters which that party regards as "in dispute." . . . The proper response in such cases is an answer. The very purpose of the request is to ascertain whether the

(Cont'd)

517 U.S. 416, 426 (1996) (courts do not have "the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure").

(Cont'd)

> answering party is prepared to admit or regards the matter as presenting a genuine issue for trial.

Fed. R. Civ. P. 36(a), Advisory Committee Notes (1970 amendments). Consistent with Rule 36, the Eleventh Circuit previously allowed requests that track the "material averments" of the complaint. *JD Pharmaceutical*, 893 F.2d at 1204, 1209. Also, in *Stubbs v. IRS*, 797 F.2d 936, 937-38 (11th Cir. 1986), the same court held that the district court properly granted summary judgment based on facts deemed admitted by a party's failure to respond to request for admissions relating to core issues in the case.

The Eleventh Circuit also mistakenly held that Petitioner was "prohibited" from serving his initial requests for admissions with the Complaint. (Pet. App. 31a) This holding is contrary to Local Rule 26.1(F)(3) of the United States District Court for the Southern District of Florida at the time the initial requests were served with the Complaint: "Requests under Rules 34 and 36, Fed. R. Civ. P., may, without leave of the court, be served upon . . . , any other party *with . . . the summons and complaint*. . . ." S.D. Fla. L.R. 26.1(F)(3) (1997) (emphasis added).

The Eleventh Circuit also held that Petitioner only relied on the admissions for six days (from the date that summary judgment was entered until the time that Respondent finally moved to withdraw the admissions). (Pet. App. 29a). This holding is contrary to the specific language of Rule 36. As the Eleventh Circuit states in its opinion, Respondent failed to respond to the June 25, 1997 requests until February 3, 1998 and failed to respond to the October 3, 1997 requests until February 19, 1998. (Pet. App. 12a n.11). Pursuant to Rule 36(a), Petitioner was entitled to rely on the admissions immediately upon the failure of Respondent to respond within the time provided by the rule several months earlier. Fed. R. Civ. P. 36(a) (automatic admission unless party

(Cont'd)

The necessity of affording district courts discretion to enforce admissions against parties who fail to comply with Rule 36 also is illustrated by Respondent's failure to file a motion to withdraw the admissions until after the entry of summary judgment[6] and the Rule 16 motion cutoff. The district court emphasized in its order denying Respondent's motion to withdraw admissions that it had previously ordered the parties to comply with its scheduling order "under penalty of dismissal or other sanctions." (Pet. App. 48a). Respondent ignored the district court's order

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(Cont'd)

responds). Contrary to the conclusion of the Eleventh Circuit, the Advisory Committee Notes emphasize that Petitioner was entitled to rely on the admissions upon the failure of Respondent to timely respond: "Unless the party securing an admission can depend on its binding effect . . . the purpose of the rule is defeated." Fed. R. Civ. P. 36(b), Advisory Committee Notes (1970 amendments).

Finally, the Eleventh Circuit held that Petitioner would not be prejudiced by the unavailability of a key witness (Alsbury) in a re-trial of this action. (Pet. App. 27a n.26). The court reached this conclusion notwithstanding Respondent's earlier statement that the unavailability of a key witness constitutes prejudice (Respondent's Initial Brief in Appeal No. 98-5075 at 28) and the Court of Appeals' precedent holding that the unavailability of a key witness constitutes prejudice under Rule 36(b). *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1578 (11th Cir. 1988).

6. In addition to waiting until after the entry of summary judgment to file its motion to withdraw admissions, Respondent also failed to properly contest the matters set forth in Petitioner's motion for summary judgment. In this regard, the district court emphasized that Respondent failed to comply with Rule 56 of the Federal Rules of Civil Procedure: "The response is devoid of any other evidence contesting the matters conclusively established by the admissions." (Pet. App. 55a).

by refusing to respond to Petitioner's discovery and filing an untimely motion to withdraw its admissions.

District courts have the power to police their own docket. To give meaning to this power, district courts may deny motions on the basis that they are untimely. First, the district court had the authority to deny Respondent's motion to withdraw its admissions, because it was filed after the Rule 16 motion cutoff. In *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir. 1992), the Ninth Circuit held that courts have the discretion to deny motions that violate scheduling orders:

> A scheduling order "is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." . . . The district court's decision to honor the terms of its binding scheduling order does not simply exalt procedural technicalities over the merits of [the party's] case. Disregard of the order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier.

Id. at 610 (citation omitted); *see also Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998) (same); *Dredge v. Kendrick*, 849 F.2d 1398, 1398 (11th Cir. 1988) (court need not address the merits of a motion that violates a Rule 16 scheduling order).

The Fifth Circuit also has emphasized the importance of allowing district courts to enforce their scheduling orders. In *Geiserman v. MacDonald*, 893 F.2d 787 (5th Cir. 1990), the Fifth Circuit upheld the district court's "refusal to modify the scheduling order and its enforcement of the time

deadlines." *Id.* at 792. In doing so, the court highlighted the policy behind allowing courts to enforce their scheduling orders:

> Regardless of [plaintiff's] intentions, or inattention, which led to the flouting of discovery deadlines, such delays are a particularly abhorrent feature of today's trial practice. They increase the cost of litigation, to the detriment of the parties enmeshed in it; they are one factor causing disrespect for lawyers and the judicial process. . . . Adherence to reasonable deadlines is critical to restoring integrity in court proceedings. We will not lightly disturb a court's enforcement of those deadlines and find no reason for doing so here.

Id. at 792.

Respondent's motion also was untimely, because it was filed after the entry of summary judgment. For example, in *BAW Mfg. Co. v. Saks Fifth Ave. Ltd.*, 547 F.2d 928 (5th Cir. 1977), the Fifth Circuit affirmed the district court's entry of summary judgment based on requests for admissions to which a party failed to respond. The court held that the district court "properly refused" a motion to withdraw the deemed admissions, which was filed after the entry of summary judgment, because it was "untimely." *Id.* at 930. Similarly, Respondent's motion to withdraw the admissions was a nullity given that it waited until after the entry of summary judgment to file it.

Accordingly, the district court had the power to police its docket by denying untimely motions and enforcing Respondent's admissions.

CONCLUSION

Rule 36(b) affords district courts the power to enforce admissions against parties who fail to comply with the discovery rules. The necessity of providing district courts with such discretion is illustrated by this case. Courts should have the discretion to enforce admissions where, as here, there is an undisturbed finding that a party made misrepresentations to the court, litigated in a "deceptive" and "misleading" manner, "flagrantly disregarded" the rules, and "utterly neglected" the case. This is especially so where a party waits to move to withdraw admissions until after the entry of summary judgment and the motion cutoff and does not offer any countervailing evidence at the hearing on the motion for summary judgment.

The Eleventh Circuit did not disturb the district court's findings as to Respondent's misbehavior. Instead, the opinion excuses Respondent's conduct. Unless the Eleventh Circuit's opinion is reversed, it forever will stand for the proposition that a party can misrepresent matters to a court, engage in "deceptive" and "misleading" litigation practices, "flagrantly disregard" the rules of civil procedure, "utterly neglect" the case and, yet, be able to withdraw properly deemed admissions after the Rule 16 motion cutoff and the entry of summary judgment.

Because the Eleventh Circuit's opinion directly conflicts with the rules of construction of this Court, the opinions of other circuits, and the language of Rule 36(b), Petitioner respectfully requests that this Court grant his petition for writ of certiorari to review the opinion of the Eleventh Circuit.

Respectfully submitted,

PETER W. BELLAS
GENOVESE JOBLOVE & BATTISTA, P.A.
Bank of America Tower
100 Southeast Second Street, 36th Floor
Miami, Florida 33131
(305) 349-2300

Attorneys for Petitioner

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED SEPTEMBER 20, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15132-DD

MICHAEL PEREZ,

Plaintiff-Appellee-
Cross-Appellant,

versus

MIAMI-DADE COUNTY,

Defendant-Appellant-
Cross-Appellee,

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d___).

Before: TJOFLAT, MARCUS and BRIGHT*, Circuit Judges.

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* Honorable Myron H. Bright, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix A

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JULY 17, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-15132
Non-Argument Calendar

D. C. Docket No. 97-01915-CIV-JLK

MICHAEL PEREZ,

Plaintiff-Appellee-
Cross-Appellant,

versus

MIAMI-DADE COUNTY,

Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(July 17, 2002)

Before TJOFLAT, MARCUS and BRIGHT*, Circuit Judges.

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* Honorable Myron H. Bright, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Appendix B

TJOFLAT, Circuit Judge:

The primary issue in this appeal is whether the district court abused its discretion in denying the defendants' motion, made pursuant to Rule 36(b) of the Federal Rules of Civil Procedure, to withdraw admissions.[1] As a result of the court's action, the plaintiff established the defendants' liability under 42 U.S.C. § 1983 as a matter of law and obtained a multi-million dollar jury verdict. We conclude that the court abused its discretion; we therefore vacate the judgment and remand the case for further proceedings.

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1. Rule 36(b), entitled "Effect of Admission," states in pertinent part as follows:

> Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

Here, the defendants styled their motion a "Motion to Withdraw or Amend Admissions." For convenience, we refer to it as a motion to withdraw admissions.

Appendix B

I.

A.

On March 24, 1995, Michael Perez and his partner, both detectives in the Miami-Dade County Police Department, were working undercover when they overheard a police radio report that fellow officers were in pursuit of several black males who had just robbed a Radio Shack. Perez and his partner joined the chase, and, upon discovering the suspects driving away from the scene, followed them by car. When the suspects abandoned their vehicle, Perez and his partner chased them on foot.

Meanwhile, Sergeant William Allsbury,[2] also a County officer, was patrolling in his police car when he heard the same radio report, and, seeing Perez and his partner running along the street in the same area, believed them to be two of the suspects. When Allsbury closed in on Perez and his partner, his vehicle struck Perez. Perez contends that Allsbury struck him intentionally and that, as a result, he suffered serious injuries, including herniated discs, broken bones, and permanent psychological damage.

B.

Perez filed this action on June 19, 1997. His complaint contained four counts against the County and four against Allsbury. Count I sought relief against both defendants under

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2. Throughout the record, Sergeant Allsbury's name is spelled either as "Alsbury" or "Allsbury." Because both the complaint and the district court used the spelling "Allsbury," we do the same.

42 U.S.C. § 1983.[3] It alleged that the County had a "practice, custom or policy . . . [of] allowing police officers to use unnecessary and unreasonable deadly force, including, but not limited to, the use of motor vehicles to strike and detain subjects, in the apprehension of persons," and that Allsbury was carrying out that practice, custom, or policy when his automobile struck Perez. Aimed only at Allsbury, Counts II and III alleged claims of common law negligence and assault and battery, respectively. Counts IV and VI sought relief solely against the County under two Florida statutes: the "Whistle Blower's Statute" for "retaliatory personnel action[s]" the County allegedly took against Perez after he reported the incident, and the "Full Pay Statute," which entitles an employee to full pay upon being injured at work.[4]

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3. 42 U.S.C. § 1983 states the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was available.

4. Nowhere in the complaint is there a citation to either of these statutes. Presumably, Perez was relying on Fla. Stat. chs. 112.3187-112.31895 ("Whistle-Blowers Act") and Fla. Stat. chs. 440.15(11) ("Full-Pay Statute").

Finally, Count V, directed at both the County and Allsbury under 42 U.S.C. § 1985, alleged that the two defendants had "conspired to deprive [Perez] of equal protection of the laws and of equal privileges and immunities under the laws based upon [their] animus against persons of African American or Latin origin." In each count, Perez prayed for compensatory and punitive damages "in excess of $5 million."[5]

Along with the complaint, Perez served the County with a Request for Admissions ("June 25 Request"), consisting of forty admissions.[6] The request was, for the most part,

5. Perez also asked for a declaratory judgment that his rights had been violated and for permanent injunctive relief. Perez appears to have abandoned his claim for such relief.

6. Rule 36(a) states that "requests for admission may not be served before the time specified in Rule 26(d)." Rule 26(d) specifies that, unless the parties agree, "a party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)," which requires the parties to "confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement . . . and to develop a proposed discovery plan. . . ." Here, Perez served the June 25 Request with the complaint — well before the parties had met as required by Rule 26(f). The County, however, did not object to the premature service. Rather, the County contends that it never received the June 25 Request and points out that the summons and return indicate "only that the complaint was served and not th[is] first request or any other paper." The district court found that the request had indeed been served with the complaint and noted that the June 25 Request "displays the same file stamp by the Clerk of Court as the original Complaint, civil cover sheet, and summons." For purposes of this appeal, we treat the June 25 Request as having been served on the County in accordance with law and hold that the court's finding that the County received the request is not clearly erroneous.

a verbatim copy of the complaint, save a few minor changes, like inserting "Request for Admissions" in the place of "Complaint" and deleting the complaint's subsection titles, like "Factual Background" and "Claim 1." Indeed, the June 25 Request is replete with the same typographical errors as the complaint and even includes such statements as, "This is a claim for deprivation of constitutional rights under color of state law . . ." and "Plaintiff incorporates by reference the allegations of paragraphs 1 through 16."

Though it did not answer the June 25 Request, the County, along with Allsbury, filed answers to the complaint on July 14, 1997, and denied, or claimed to be without sufficient knowledge to answer, all but two of the complaint's allegations.[7] Significantly, the defendants denied (1) that Allsbury "intentionally or negligently aimed his vehicle directly at [Perez], gunned the engine, and struck [him]" and (2) that the County has "a practice, custom, or policy allowing police officers to use unnecessary and unreasonable deadly force . . . in the apprehension of persons." The defendants also pleaded several affirmative defenses, including contributory and comparative negligence and assumption of risk. The answers were signed by Eric K. Gressman, Assistant County Attorney.

On September 12, 1997, the district court held a scheduling conference, attended by Perez's attorney and Gressman. At the conference, in discussing the merits of the case, Gressman reiterated what had been stated in the defendants' answers: that "there is no policy or procedure that says that

7. The defendants shared representation and jointly filed their answers and many of their subsequent motions.

[officers may] use cars to run over suspects . . . unless deadly force is being used against [an officer]." Also at the conference, Perez's attorney stated that he had prepared written discovery requests, including requests for admissions, that, "according to Mr. Gressman, have not yet [been] served on him," but would be re-served "in the next couple of days." Following the conference, the district court entered a scheduling order, setting the pretrial conference for February 20, 1998, and requiring that all motions be filed by February 1 and that all discovery be completed by February 15.

On October 3, 1997, Perez served the County with a second request for admissions ("October 3 Request") consisting of seventy-two admissions.[8] This request was a verbatim copy of the June 25 Request with the addition of thirty-four new items. Most of the new items concerned the extent of Perez's injuries, e.g., "As a result of being hit by Seargent (sic) Allsbury's vehicle, Plaintiff suffered a broken leg." Along with the October 3 Request, Perez served the County with a request for production of documents and notices for the taking of depositions of several County officials and employees.

Time passed and, as the district court ultimately found, the County "failed to produce the requested documents within thirty days, did not produce the witnesses for the scheduled depositions, and failed to respond to the [October 3 Request]

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8. As with the June 25 Request, Gressman contends that he never received this second request; he stated as much in an affidavit he submitted to the district court. The district court, however, found otherwise, pointing to the certificate of service attached to the request, which is "clearly dated October 3, 1997." We accept this finding.

within thirty days." On January 6, 1998, therefore, Perez re-served the discovery requests, including the October 3 Request. Gressman does not dispute that he received the January 6 discovery request, which was stamped "Received by [Miami-]Dade County Attorney, January 6, 1998."

On January 27, having not received any response from the County as to his discovery requests, Perez moved the district court to strike the defendants' answers and enter a default judgment because the officials and employees had not appeared to testify at their scheduled depositions, or, in the alternative, to compel production of the witnesses and documents sought. As for the unanswered requests for admissions, Perez argued that, under Rule 36(a) of the Federal Rules of Civil Procedure, the matters should be deemed admitted because the County had not responded within the rule's thirty-day time limit.[9] Three days later, on January 30, 1998, Perez filed a motion for summary judgment on Count I, setting forth claims under section 1983, and asserted that the defendants, by failing to respond to the requests for admissions, "have admitted to all material facts and issues including that it is a custom, practice, and policy of the department to engage in the unnecessary use of deadly force."[10]

On February 3, 1998, before the district court ruled on Perez's two outstanding motions, the County finally responded to the June 25 Request, denying, or asserting the

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9. The relevant portions of Rule 36(a) are set out *infra* note 22.

10. Although the discovery requests, including the requests for admissions, had been directed only to the County, Perez sought summary judgment on the section 1983 claims as to both defendants.

inability to admit or deny, almost all of the items. Two days later, the County asked the court for more time to respond to Perez's other discovery requests, asserting that it had first received those requests on January 6, 1998, and that the deadlines for responding be calculated from the date of January 8. The district court granted the motion on February 10.

Soon after receiving the County's answer to the June 25 Request, Perez, on February 18, filed a motion "to Strike [the County's] Response to Request for Admissions, to Determine the Responses Insufficient, and to Order the Requests Admitted." In this motion, Perez once again argued that the court should deem as admitted the items from both the June 25 Request and the October 3 Request because the County had answered the June 25 Request over six months after service and had completely failed to answer the October 3 Request. Failing to act within thirty days of service, Perez reiterated, violates Rule 36(a) and requires that the court find the items admitted.

The day before the pretrial conference, held on February 20, 1998, Gressman filed, on behalf of both defendants, a response to Perez's summary judgment motion and, along with the response, finally answered the October 3 Request. The response to the summary judgment motion was timely because the court had extended the defendants' deadline to respond. The court had not, however, extended the thirty-day time limit for answering the October 3 Request.

Appendix B

At the pretrial conference, after accepting as timely the defendants' response to Perez's summary judgment motion, the district court turned to Perez's motion to strike the County's answer to the June 25 Request. Before the court ruled, Gressman pointed out that the County had actually responded to both requests, albeit belatedly.[11] The district court, without acknowledging Gressman's statement, proceeded to deem as admitted several of the items from both the June 25 and October 3 Requests.[12] Among others, the district court found that the following key items had been admitted: 1) Sergeant Allsbury was, at all times relevant, a County police officer; 2) Allsbury believed Perez to be an African-American suspect and intentionally aimed his vehicle directly at Perez and struck him; 3) Perez was seriously injured as a result of the incident — suffering a permanent total disability; 4) the County had a practice, policy, or custom of allowing police officers to use unnecessary and unreasonable deadly force, including the use of motor vehicles to strike and detain subjects; and 5) Allsbury struck Perez in accordance with the County's practice, policy, or custom.[13] Gressman, in an unsuccessful attempt to salvage

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11. The County had responded to the June 25 Request on February 3 and to the October 3 Request on February 19.

12. The district court did not deem as admitted all of the items from the two requests. The court struck a number of items that improperly called for a "legal conclusion," and struck others that were "uniquely within the knowledge of the plaintiff as opposed to the defendant."

13. In ruling that the remaining items were deemed admitted, the court gave one of two reasons. For those items the County had claimed to be without sufficient information with which to respond

(Cont'd)

his clients' case, argued that "there is no prejudice [to Perez] whatsoever in [giving effect to] these late responses, if you want to call them late responses, to the requests for admissions." The court did not address his argument.

The indirect effect of the court's ruling was to strike the answers of both defendants. That is, by finding the items admitted, the court had effectively deemed "conclusively established" all of the elements of Perez's section 1983 claims, to wit: that Allsbury, acting under color of state law, intentionally struck Perez as a result of the County's "practice, policy or custom of allowing police officers to use unnecessary and unreasonable deadly force." *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 2037-38, 56 L. Ed. 2d 611 (1978) ("It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under section 1983."). With these elements conclusively established, the district court granted Perez's motion for summary judgment against both defendants, but only as to liability.[14]

(Cont'd)

adequately, the court found that they were, instead, "fairly simply (sic) of being answered," and thus, it was improper "to say that the [County] doesn't have sufficient information." For all other items, the court simply stated that they "were unresponded to" and are therefore "deemed admitted."

14. The court used the County's admissions in granting Perez's summary judgment motion against Allsbury. This was obvious error. Because Allsbury was later dismissed as a defendant, however, the issue is moot.

Appendix B

On February 26, the defendants, still represented by Gressman, under seal, with leave of court, filed a motion to withdraw admissions.[15] In the motion Gressman submitted that, during the time period at issue, he was under the care of a psychologist for a serious mental health condition that had rendered him incapable of carrying out his professional responsibilities, including the representation of the County and Allsbury in the instant case. These circumstances alone, he suggested, were sufficient to grant the defendants the relief they were seeking. Alternatively, Gressman asserted, the court should grant relief because substantial doubts existed as to whether, as Perez was contending, the County maintained a "practice, policy, or custom" of running down suspects with police vehicles and whether Allsbury had struck Perez intentionally.[16] Therefore, Gressman pleaded, a manifest injustice would result if the court adhered to its previous dispositive rulings.

The next day, the court entered a one-page order which confirmed the rulings it had made at the February 20

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15. Although the requests for admissions had been directed to and answered by the County, Gressman filed the motion to withdraw on behalf of both defendants. Presumably, Gressman did so because the district court had granted summary judgment as to both the County and Allsbury as a result of the County's admissions.

16. Gressman attached to his motion the deposition transcripts of various County officers, all of whom had been deposed by Perez during the period of February 9 through February 11. None of the depositions, according to Gressman, "indicate[s] that it was a policy of [the County] to run over African Americans or other fleeing suspects with a police car."

pretrial conference — granting Perez's "Motion to Strike [the County's] Response to Request for Admissions, to Determine the Responses Insufficient, and to Order the Requests Admitted" and Perez's "Motion for Summary Judgment." The court's order made no mention, however, of the motion Gressman had just filed under seal the day before.

On March 3, still without a ruling on his motion to withdraw, Gressman moved the court to reconsider its earlier rulings. The court finally ruled on April 9, denying the motion to reconsider as well as the motion to withdraw.[17] The court reasoned that Rule 36(a) of the Federal Rules of Civil Procedure "provides that matters set forth in a request for admissions are deemed admitted unless 'the party to whom the request is directed serves upon the party requesting the admission, a written answer within 30 days.'" The court further found that the County had received both requests months before they were answered and that Gressman's personal problem "simply d[id] not justify his utter neglect of this case and flagrant disregard for the Federal Rules of Civil Procedure for over seven months." In short, Gressman "ha[d] not provided an adequate excuse" to justify withdrawing the admissions or reconsidering the earlier rulings.

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17. The court's order was in response to the following: (1) the defendants' February 26 "Motion to Amend or Withdraw Admissions, Clarify and Vacate and Request for Hearing on the same," (2) the County's March 3 "Motion for Reconsideration," and (3) Allsbury's February 26 "Objection to Oral Ruling and Motion to Vacate and/or Clarify." The latter motion, made by Allsbury, objected to the court's summary judgment ruling because it established liability against Allsbury based on the *County*'s failure to respond to requests for admissions directed only to the *County*.

In a second order issued on April 9, the court reiterated its previous orders granting Perez summary judgment on the liability aspects of his section 1983 claims against the County and Allsbury and scheduled those claims for trial before a jury on April 27, 1998. The trial began on that date. After Perez rested, he dismissed Allsbury as a party defendant without prejudice. The jury received the case on May 1, and, that same day, returned a verdict against the County, awarding Perez $5.7 million in compensatory damages. After denying the County's motion for a new trial, the court entered judgment against the County for $5.7 million.

C.

The County appealed the district court's judgment, but we dismissed the appeal for lack of appellate jurisdiction. The court had neither disposed of Perez's remaining claims nor entered a partial final judgment on Perez's section 1983 claim pursuant to Rule 54(b) of the Federal Rules of Civil Procedure; consequently, the case lacked a final judgment within the meaning of 28 U.S.C. § 1291.[18] *See Perez v. Miami-Dade County*, No. 98-5075, at 8 (11th Cir. March 1, 2001) (unpublished opinion).

On remand, the County moved the court to enter a final judgment on the Count I section 1983 claim under Rule 54(b). The court did so on May 8, 2001. One week later, Perez, relying on the district court's previous rulings in his favor, moved the court for summary judgment with respect to the

18. Section 1291 states that courts of appeal "shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

issue of liability on his remaining claims — Counts IV, V, and VI.[19] The County likewise moved for summary judgment on those counts on May 25. On August 22, 2001, the court granted the County's motion and gave it final judgment on the three remaining counts. Coupled with the Rule 54(b) judgment, the August 22 judgment brought an end to the controversy.

The County now appeals the judgment on Count I, and Perez cross-appeals the judgments on Counts IV, V, and VI. Perez's assignments of error — laid out in the margin[20] — are without merit. We therefore limit our discussion to the County's appeal, namely to the issue set out in the first paragraph of this opinion: whether the district court abused its discretion in denying the County's (and Allsbury's) motion, made pursuant to Rule 36(b) of the Federal Rules of Civil Procedure, to withdraw admissions.

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19. Because Allsbury had been dismissed at trial as a defendant, Claims II and III were also dismissed.

20. In his cross-appeal, Perez contends that the district court erred (1) in rejecting Count IV, set forth under the Whistle-Blowers Act, on the ground that he had not exhausted his administrative remedies; (2) in applying the intracorporate conspiracy doctrine to foreclose Count V, his claim under 42 U.S.C. § 1985; and (3) in concluding that his evidence was insufficient to support Count VI, the claim made under the Full-Pay Statute. Finally, Perez contends that the County is barred from obtaining a "judgment as a matter of law" on those counts because it failed to assert the proper affirmative defenses and "to assert a Rule 50(a) motion" at the close of the evidence at trial.

Appendix B

III.

A.

At the outset, we emphasize that district courts are entitled to broad discretion in managing pretrial discovery matters. *See, e.g., Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1269 (11th Cir.2001) (citing *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1366 (11th Cir.1997); *United States v. McCutcheon*, 86 F.3d 187, 190 (11th Cir.1996)). "Given the caseload of most district courts and the fact that cases can sometimes stretch out over years, district courts must have discretion and authority to ensure that their cases move to a reasonably timely and orderly conclusion." *Chrysler Int'l Corp. v. Chemaly*, 280 F.3d 1358, 1360 (11th Cir.2002). Indeed, we have repeatedly emphasized the responsibility of trial courts to manage pretrial discovery properly in order to avoid "a massive waste of judicial and private resources" and a loss of society's "confidence in the courts' ability to administer justice." *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1333 (11th Cir.1998) (internal citation omitted); *see also Byrne v. Nezhat*, 261 F.3d 1075, 1132-34 (11th Cir.2001); *Ebrahimi v. Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir.1997); *Pelletier v. Zweifel*, 921 F.2d 1465, 1522 (11th Cir.1991).

Nevertheless, "[t]his discretion [over discovery issues] is not wholly unfettered." *Chrysler Int'l Corp.*, 280 F.3d at 1360. We therefore review the district court's denial of the County's motion to withdraw the admissions under the abuse

of discretion standard. *See Dean v. Barber*, 951 F.2d 1210, 1213 (11th Cir.1992).[21]

B.

Rule 36 of the Federal Rules of Civil Procedure governs requests for admissions, allowing a party to serve on "any other party a written request for the admission . . . of the truth of any matters within the [general scope of discovery] set forth in the request that relate to statements or opinions of fact or of the application of law to fact." Fed. R. Civ.

21. Perez contends that we need not even consider the merits of the County's motion to withdraw because it was untimely under the district court's pretrial scheduling order. *See Dedge v. Kendrick*, 849 F.2d 1398, 1398 (11th Cir.1988) (affirming the denial of a motion for summary judgment that was filed over one month after the pretrial deadline for filing and hearing motions). In particular, Perez asserts that the County (and Allsbury) filed the motion to withdraw on February 26, 1998, some twenty-six days after the district court's deadline for pretrial motions. Under Rule 16(b) of the Federal Rules of Civil Procedure, Perez points out, "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge." We note, however, that the district court considered the County's motion to withdraw (along with the County's motion for reconsideration) and *decided it on the merits*. Whether a motion was filed timely and is appropriate under a pretrial order is a question left to the district court's discretion. *See, e.g., Spiller v. Ella Smithers Geriatric Ctr.*, 919 F.2d 339, 343 (5th Cir.1990) (inferring that the district court modified its scheduling order by considering a motion after the order's cut-off date). We therefore defer to the district court's interpretation of its scheduling order rules, *see Lockett v. Bd. of Educ.*, 111 F.3d 839, 843 n.2 (11th Cir.1997), assume that the district court found that good cause had been shown, and consider the motion timely.

P. 36(a).[22] The purpose of the rule is "to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial." 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2252 (2d ed. 1994); *Pickens v. Equitable Life Assurance Soc'y*, 413 F.2d 1390, 1393 (5th Cir.1969). The served party has thirty days after service to respond to the request — by a written answer "specifically deny[ing] the matter" or "set[ting] forth in detail the reasons why [it] cannot truthfully admit or deny the matter" or by objecting to the request. Fed. R. Civ.P. 36(a). If a party fails to respond within thirty days, then "[t]he matter is admitted." *Id.*

Once the matter is admitted, Rule 36(b) provides that it is "conclusively established unless the court on motion permits withdrawal or amendment of the admission."

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22. The relevant portions of Rule 36(a) state:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters . . . set forth in the request that relate to statements or opinions of fact or of the application of law to fact. . . . The matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter. . . . The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. . . . If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served.

Fed. R. Civ. P. 36(b).[23] A court "may permit withdrawal or amendment [of an admission] when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits."[24] *Id.* Based on this language, we have held that district courts should apply a "two-part test" in deciding whether to grant or deny a motion to withdraw or amend admissions. *Smith v. First Nat'l Bank*, 837 F.2d 1575, 1577 (11th Cir. 1988). First, the court should consider whether the withdrawal will subserve the presentation of the merits, and second, it must

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23. See the relevant portions of Rule 36(b) *supra* note 1.

24. Rule 36(b) also states that a court's permission is "[s]ubject to the provision of Rule 16 governing amendment of a pre-trial order." Fed. R. Civ. P. 36(b). Under Rule 16(e), the provision on amendments of pretrial orders, the district court must enter an order "reciting the action taken" at the conclusion of a pretrial conference. This order "shall be modified only to prevent manifest injustice." Fed. R. Civ. P. 16(e). Thus, if the motion to withdraw would have modified a final pretrial order, then the County must show that the withdrawal was necessary to prevent manifest injustice.

Here, however, the motion to withdraw was filed on February 26, one day before the district court entered the order granting Perez's motion to strike and motion to deem the items admitted. Even assuming that the February 27 order was a final pretrial order, which is not obvious on its face, the motion to withdraw did not seek to modify that order, but rather, to modify the action taken at the pretrial conference. Because the motion would not have modified a final pretrial order, Rule 16(e) is inapplicable.

determine whether the withdrawal will prejudice the party who obtained the admissions in its presentation of the case. *Id.*; *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995); *FDIC v. Prusia*, 18 F.3d 637, 640 (8th Cir.1994).

Perez contends, however, that applying the two-part test is permissive and that Rule 36(b), in stating that a court "*may*" allow a withdrawal or amendment, does not require a district court to grant such motions even if the two-part test is met. For this proposition, Perez cites *Carney v. IRS*, 258 F.3d 415, 419 (5th Cir.2001), which stated, in dictum, that, "[e]ven when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission."[25] We do not deny that Rule 36(b) vests the district court with discretion in ruling on motions to withdraw or amend admissions. We disagree with Perez, however, to the extent that he argues that such discretion is unfettered. *See supra* part III.A (discussing the power of appellate courts to review discovery decisions made by district courts, albeit with deference).

Indeed, we read Rule 36(b) as granting a district court discretion but then specifying exactly how that discretion is to be exercised. *See, e.g., In re Durability Inc. v. Sovereign Life Ins. Co.*, 212 F.3d 551, 556 (10th Cir. 2000) ("The court's focus must be on the effect upon the litigation and prejudice to the resisting party rather than . . . on the moving party's

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25. The statement is dictum because the court affirmed the district court's denial of the party's motion to withdraw the admissions based on another reason — that the party had never filed a motion for leave to withdraw the admissions as required by Rule 36(b). *See Carney*, 258 F.3d at 419-20.

excuses for an erroneous admission.") (citing 10A Federal Procedure L. Ed. § 26.500 (1988) (internal mark omitted)); *Asea, Inc., v. Southern Pac. Transp. Co.*, 669 F.2d 1242, 1248 (9th Cir. 1981) ("In a proper case . . . such as when an admission has been made inadvertently, Rule 36(b) might well require the district court to permit withdrawal."); *Mid Valley Bank v. North Valley Bank*, 764 F.Supp. 1377, 1391 (E.D.Cal.1991) ("[A]lthough the motion [to withdraw admissions] is, as the parties acknowledge, directed to the sound discretion of the court, the discretion should not be exercised in terms of the defaulting party's excuses, but in terms of the effect upon the litigation and prejudice to the resisting party.") (internal citations omitted). Rule 36(b)'s two-part test is much more than merely hortatory; it "emphasizes the *importance of having the action resolved on the merits*, while at the same time assuring each party that justified reliance on an admission in preparation for trial will not operate to his prejudice." *Smith*, 837 F.2d at 1577-78 (quoting Fed. R. Civ. P. 36 advisory committee's note) (emphasis added).

While we stop short of holding that movants have "an absolute right . . . to have [their] admissions withdrawn," *Asea*, 669 F.2d at 1248, we nonetheless believe that, to best fulfill the purposes of Rule 36, a district court must abide by the two-part test of Rule 36(b). We hold, therefore, that a district court abuses its discretion under Rule 36(b) in denying a motion to withdraw or amend admissions when it applies some other criterion beyond the two-part test — or grossly misapplies the two-part test — in making its ruling. *See Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1313 (8th Cir.1983) ("Regardless of the intentions of the district court to sanction [the party], we find the district erred in not considering the factors set out in [R]ule 36(b).").

C.

Here, the district court denied the defendants' motion to withdraw admissions without even discussing the two-part test of Rule 36(b). The court, in fact, never even mentioned Rule 36(b) at all; rather, it focused on the thirty-day time limit from Rule 36(a), noted that the County had missed the deadlines for both requests, and reaffirmed its finding that the items had been deemed admitted. Even though, in their motion to withdraw, the defendants had argued that Perez had shown no prejudice, the only other reason the district court gave for denying the withdrawal was the inadequacy of the County's excuse for its belated responses. Specifically, the court noted that the personal problems of Gressman, the County attorney, "simply do[] not justify [the County's] utter neglect of this case and flagrant disregard for the Federal Rules of Civil Procedure for over seven months."

Denying the motion to withdraw based on this reasoning (or lack thereof) was an abuse of discretion. Moreover, had the court properly applied the two-part test mandated by Rule 36(b), it would have found that withdrawal was not only appropriate but necessary.

1.

The first prong of the two-part test from Rule 36(b) calls for a determination of whether "the presentation of the merits will be subserved" by allowing a withdrawal or amendment of the admissions. This part of the test "emphasizes the importance of having the action resolved on the merits,"

Smith, 837 F.2d at 1577, and is "satisfied when upholding the admissions would practically eliminate any presentation of the merits of the case," *Hadley*, 45 F.3d at 1348. In *Hadley*, for example, the court found that two of the admissions "essentially admitted the necessary elements [of the claims];" therefore, withdrawal was proper. *Id.*

In the instant case, the items the court had deemed admitted conclusively established the liability of both defendants under 42 U.S.C. § 1983. For instance, the court found that the County had admitted that it had "a practice, policy, or custom of allowing police officers to use unnecessary and unreasonable deadly force, including the use of motor vehicles to strike and detain subjects." A municipality's practice, policy, or custom is not some tangential factual matter in a section 1983 case; it is the core element and is, consequently, often the most disputed. Deeming this element admitted took the wind out of the defendants' sails and effectively ended the litigation.

Thus, granting the motion to withdraw the admissions would have certainly aided in the " 'ascertainment of the truth and the development of the merits.' " *Smith*, 837 F.2d at 1577 (quoting with approval the district court's opinion in that case); *see also Manatt v. Union Pac. R.R. Co.*, 122 F.3d 514, 517 (8th Cir.1997) ("In the circumstances of this case, the prospect of deeming the controverted fact as having been admitted seems to be anathema to the ascertainment of the truth.") (citations and internal marks omitted). The first prong of the two-part test is therefore easily met.

Appendix B

2.

Rule 36(b)'s second prong requires the court to ascertain whether the non-moving party would be prejudiced by a withdrawal or amendment of admissions. We have before explained:

> The prejudice contemplated by the Rule is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g., caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the questions previously answered by the admissions.

Smith, 837 F.2d at 1578 (quoting *Brook Village N. Assoc. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir.1982)). For this reason, a court is more likely to find prejudice when a party seeks to withdraw its admissions once trial has already begun. *See, e.g., 999 v. C.I.T. Corp.*, 776 F.2d 866, 869 (9th Cir.1985) ("Had [the defendant] made this argument [that there was no prejudice] while moving for withdrawal of the admission before trial, it would have been more persuasive.").

Although the motion to withdraw the admissions was made before trial, Perez nonetheless argues that a withdrawal would have been prejudicial. Perez unconvincingly asserts that he "rel[ied] upon the admissions in his preparation for

trial," an astonishing claim in light of the facts.[26] Indeed, the defendants, in denying the allegations of the complaint (a document that mirrors the bulk of the requests for admissions), maintained from the very beginning that they would contest Perez's core allegations. Moreover, at the scheduling conference held on September 12, 1997, Gressman reiterated what had been stated in the defendants' answers: that "there is no policy or procedure that says that [officers may] use cars to run over suspects . . . unless deadly force is being used against [an officer]." Finally, attached to Perez's "Unilateral Pretrial Stipulation,"[27] filed on February 18, 1998,

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26. In his reply brief, Perez asserts a new reason for finding prejudice — that Sergeant Allsbury died on December 19, 1999. The prejudice inquiry, however, must focus on the harm Perez would have incurred in late February or early March 1998 had the district court granted the defendants' motion to withdraw. Allsbury's death, an event occurring long after the motion was filed, in no way prejudiced Perez. Moreover, even if we shift our focus to the present, we find no prejudice because Perez deposed Allsbury before the trial, cross-examined him at the trial, and, at the close of the evidence, dismissed him as a defendant.

27. Perez filed the Unilateral Pretrial Stipulation under Southern District of Florida Local Rule 16.1(F), which is entitled "Unilateral Filing of Pretrial Stipulation Where Counsel Do Not Agree." That rule states:

> If for any reason the pretrial stipulation is not executed by all counsel, each counsel shall file and serve separate proposed pretrial stipulations *not later than five days prior to the pretrial conference*, or if no pretrial conference is held, five days prior to the call of the calendar, with a statement of reasons no agreement was reached thereon.

(Cont'd)

is a section entitled "Defendants' Statement of Facts," in which the defendants maintained that the County had no "policy or procedure . . . authorizing use of deadly force against a fleeing suspect who does not pose a risk of causing the death of an officer." The same document also reveals that the County disputed whether Sergeant Allsbury had intentionally hit Perez with his car.

(Cont'd)

(Emphasis added). Perez's stipulation was untimely because it was filed two days prior to the pretrial conference. Presumably for that reason, the court made no substantive use of the stipulation during the pretrial conference or in any of the orders relevant to the defendants' motion to withdraw.

The introductory paragraph of Perez's stipulation stated:

> Defendants have provided witness lists and exhibit lists, which Plaintiff does not believe were filed in good faith. Defendants refuse to make meaningful stipulations of facts, despite having admitted virtually every relevant fact in this litigation. The uncontested facts set forth herein are based upon the unanswered October 3, 1997, Request for Admissions, which also provided the basis for Plaintiff's previously filed motion for summary judgment.

The reason why the defendants refused to "make meaningful stipulations of facts" is, of course, that the defendants had steadfastly denied Perez's allegations. Because the court appears to have disregarded Perez's stipulation, we do not consider it, except to the extent that it shows that Perez was aware that the defendants disputed the existence of a practice, custom, or policy to run down suspects with police cars.

Appendix B

Because Perez knew from the very beginning — and continued to be made aware — that he would have to prove many of the elements of his case now deemed admitted, he would have suffered no prejudice had the court allowed a withdrawal. In fact, Perez had been engaging in discovery all along, albeit with some resistance by the County, and had only relied on the admissions for six days — from February 20 to February 26, the day on which the defendants requested a withdrawal. Certainly, allowing an amendment or withdrawal at that early point would not have created a "sudden need" for Perez to obtain evidence. Moreover, at the time the defendants requested the withdrawal, a trial on the merits had not yet begun; the district court could have simply extended the discovery deadlines — as it previously had done — to enable Perez to prove his case. The only prejudice Perez would have likely suffered would have been the inconvenience in having to gather evidence, and this "[does] not rise to a level of prejudice that justifie[s] a denial of the withdrawal motion." *Hadley*, 45 F.3d at 1349.[28]

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28. Yet another reason exists for finding that Perez would not have suffered prejudice had the court allowed the withdrawal: the County's admissions could not have possibly bound Allsbury, who, at the time the motion to withdraw was made, was still a defendant in the case. Of course, the district court, as we pointed out in note 15, improperly held that the County's admissions established liability against Allsbury. Had the court ruled correctly, however, and found that the admissions were not binding on Allsbury, then a trial on Allsbury's liability would have still had to be held, thus negating any argument Perez might have had in establishing prejudice.

Appendix B

Perez relies heavily on our decision in *United States v. 2204 Barbara Lane*, 960 F.2d 126 (11th Cir.1992), in which we affirmed the award of summary judgment for the government in a civil forfeiture action based on unanswered admissions. This reliance is misplaced. Unlike the instant case, the defendant in *2204 Barbara Lane* never disputed the underlying facts. In affirming the grant of summary judgment, we specifically noted that the defendant had conceded the essential element of the forfeiture action — that his property was used to sell cocaine. *See id.* at 129. Here, however, Perez had been warned all along that he would have to prove the most essential elements of his section 1983 claims; thus, we cannot say that he would have suffered prejudice had the court allowed the defendants to withdraw the admissions.

D.

We conclude with a comment on Rule 36 and Perez's use of requests for admissions in this case. Essentially, Rule 36 is a time-saver, designed "to expedite the trial and to relieve the parties of the cost of proving *facts that will not be disputed at trial.*" 8A Charles Alan Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice and Procedure* § 2252 (2d ed.1994) (emphasis added). That is, when a party uses the rule to establish uncontested facts and to narrow the issues for trial, then the rule functions properly. When a party like Perez, however, uses the rule to harass the other side or, as in this case, with the wild-eyed hope that the other side will fail to answer and therefore admit essential elements (that the party has already denied in its answer), the rule's

time-saving function ceases; the rule instead becomes a weapon, dragging out the litigation and wasting valuable resources.

For this reason, we believe that it is inappropriate (as well as prohibited by Rule 36 itself, *see* Fed. R. Civ. P. 36(a)) for a plaintiff to serve a request for admissions along with the complaint. It is simply too early for the defendant, having not yet received the allegations, to perceive what facts should or should not be contested. Once a defendant has answered, moreover, it continues to be inappropriate for a plaintiff to re-serve the complaint in the form of a request for admissions in order to "require the defendant to admit or deny nearly every paragraph [of a complaint it has already answered]." *E.g.*, *Downs v. Brasted*, No. 92-1611, 1993 WL 273370, at *1 (D.Kan. June 28, 1993); *Brenord v. Catholic Med. Ctr.*, 133 F.Supp.2d 179, 193 (E.D.N.Y. 2001). *But see United States v. Young*, No. 87 CIV 9159, 1990 WL 135734, at *2 (S.D.N.Y. Sept. 10, 1990) ("The mere fact that a party has previously denied the matter about which an admission is sought does not obviate the need to respond to a Rule 36 request for admissions."). This is especially true here, where the defendants had denied Perez's core allegations — that the County had a "practice, custom, or policy" of running down suspects in police cars and that Allsbury intentionally struck Perez — in the answers and again at the scheduling conference. Perez's continued service of the same request for admissions in the face of these denials was an abuse of Rule 36.

Appendix B

Rule 37 of the Federal Rules of Civil Procedure sheds further light on Rule 36. According to Rule 37(c)(2), a party may properly deny the items in a request for admissions — without fear of sanctions — as long as

> (A) the request was held objectionable pursuant to Rule 36(a), or
>
> (B) the admission sought was of no substantial importance, or
>
> (C) *the party failing to admit had reasonable ground to believe that the party might prevail on the matter*, or
>
> (D) there was other good reason for the failure to admit.

Fed. R. Civ. P. 37(c)(2) (emphasis added).[29] That is to say, even had Perez prevailed at a trial on the liability issues of

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29. Rule 37(c)(2) provides in relevant part:

> If a party fails to admit . . . the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves . . . the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (A) the request was held objectionable pursuant to Rule 36(a), or (B) the admission sought was of no

(Cont'd)

his section 1983 claims, thus establishing that the County did indeed have such a "policy, practice, or custom," it would have been entirely proper for the County to deny its existence in the requests for admissions if the County reasonably believed it might prevail on the matter. The implicit message of Rule 37 is, therefore, that issues *obviously subject to dispute should be resolved at trial*, not in a discovery motion.

IV.

In sum, we find that the district court failed to apply properly the two-part test of Rule 36(b) in considering the defendants' motion to withdraw admissions, thereby abusing its discretion. Moreover, had the court applied the test correctly, it would have ruled in the defendants' favor. Because the court granted Perez's summary judgment motion on the section 1983 claims based on the items deemed admitted, we VACATE the judgment and REMAND the case for further proceedings.

(Cont'd)

> substantial importance, or (C) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (D) there was other good reason for the failure to admit.

APPENDIX C — ORDER GRANTING SUMMARY JUDGMENT AS TO LIABILITY IN FAVOR OF PLAINTIFF AND SETTING TRIAL ON DAMAGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 8, 1998 AND FILED APRIL 9, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 97-1915-CIV-KING

MICHAEL PEREZ,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY,
and WILLIAM ALLSBURY,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT AS TO LIABILITY IN FAVOR OF PLAINTIFF AND SETTING TRIAL ON DAMAGES

THIS CAUSE comes before the Court upon Plaintiff's Motion for Summary Judgment, filed January 30, 1998. Defendants Metropolitan Dade County ("County") and William Allsbury ("Allsbury") filed a response on February 19, 1998, and the Court entertained oral argument from both parties at pre-trial conference on February 20, 1998.

Appendix C

Legal Standard

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In ruling on the moving party's motion, the court must view the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The court "should 'resolve all reasonable doubts about the facts in favor of the non-movant' and draw 'all justifiable inferences . . . in his favor.' " *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991) (alteration in original) (citation omitted).

Initially, the moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine dispute of material fact exists. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). To meet this burden, the non-moving party must go beyond the pleadings and "come forward with significant, probative evidence demonstrating the existence of a triable issue of fact." *Chanel, Inc. v. Italian Activewear of Florida, Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the court should refuse to grant summary judgment. *Hairston*, 9 F.3d at 919. However, a mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252.

Appendix C

Discussion

On February 20, 1998, the Court granted summary judgment as to liability in favor of Plaintiff by oral ruling. The Court will outline the relevant series of events leading up to the grant of summary judgment as to liability in favor of Plaintiff:

The Rules Setting Forth the Time Frame

The time for responding to requests for admissions, discovery requests, and motions is set forth in the Federal Rules of Civil Procedure, the Local Rules of the Southern District of Florida, and this Court's Order Setting Pre-trial Conference and Trial Date, entered October 14, 1997. Rule 36(a) of the Federal Rules of Civil Procedure provides that matters set forth in a request for admissions are deemed admitted unless "the party to whom the request is directed serves upon the party requesting the admission, a written answer" within "30 days after service of the request." The Order Setting Pre-Trial Conference and Trial Date sets pre-trial conference for 9:30 a.m. on February 20, 1998, and provides that all motions must be filed twenty days prior to pre-trial conference, all responses must be filed two days before pre-trial conference, all discovery must be completed five days prior to pre-trial conference, and a pre-trial stipulation must be filed five days before pre-trial conference. The Order specifically states that "the parties shall abide by the following time schedule under penalty of dismissal or other sanctions." Rule 16.1 of the Local Rules of Court for the United States District Court of the Southern District of Florida provides that the parties are bound by the deadlines

set forth in the Order Setting Pre-Trial Conference and Trial Date. Finally, Rule 7.1 (C) of the Local Rules provides that "[e]ach party opposing a motion shall serve an opposing memorandum of law not later than ten days after service of the motion."

The Untimely Answered Requests for Admissions

On June 25, 1997, Plaintiff's counsel served the Assistant County Attorney, who represents both the County and Allsbury, the summons and Complaint accompanied by a request for forty admissions from the County ("first request"). That request displays the same file stamp by the Clerk of Court as the original Complaint, civil cover sheet, and summons. (P.'s Mot. for Summ. J., Exh. 1 at 1). The Assistant County Attomey failed to answer the first request for admissions within thirty days. On October 3, 1997, Plaintiff's counsel served the Assistant County Attorney with a Request to Produce, a Notice of Taking Depositions, and a Request for seventy-two admissions from the County ("second request"). The Certificate of Service attached to the discovery requests is clearly dated October 3, 1997. (P.'s Mot. for Summ. J., Exh. 2 at 8). The Assistant County Attorney failed to produce the requested documents within thirty days, did not produce the witnesses for the scheduled depositions, and failed to respond to the second request for admissions within thirty days. On January 6, 1998, Plaintiff's counsel re-served the October 3rd discovery requests, including the second request for admissions. The second request for admissions is stamped "Received by Dade County Attorney, January 6, 1998." On February 3, 1998, the Assistant County Attorney finally responded to the first request for admissions,

over six months after it was served.[1] In that response, the Assistant County Attorney stated that he received the first request on January 6, 1998. (County's Resp. to Req. for Admis. at 1). However, nothing in the record indicates that the first request for admissions was served on any other date but June 25, 1997. On February 19, 1998, without having petitioned the Court for an extension of time, the Assistant County Attorney untimely responded to the second request for admissions.[2] (Defs.' Resp. to Mot. for Summ. J., Exh. 2 at 1). The Assistant County Attorney filed these responses with the Clerk of Court on February 20, 1998, the morning of pre-trial conference (the Clerk's office backdated the response as filed in the night box on February 19, 1998), and mailed the responses to Plaintiff's counsel on February 19, 1998. Thus, in addition to being untimely, the late-filed answers violated the Court's Order requiring the completion

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1. The Response consists of a one and one-half page document. At pre-trial conference the Court found several of the responses violated Rule 36(a)'s provision that, "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny." Fed. R. Civ. P. 36(a). Consequently, even if the Court deemed the response to be timely, which it does not, the County still would have admitted requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, and 37.

2. This Response also consists of a one and one-half page document. The response does not specifically deny each request and set forth the reasons for the denial. *See* Fed. R. Civ. P. 36(a) ("The answer shall specifically deny the matter . . . A denial shall fairly meet the substance of the requested admission."). Rather, the response sets forth a group of numbers and states that they are denied.

of discovery five days before pre-trial conference. The Assistant County Attorney had been sent a copy of the Order Setting Pre-trial Conference and Trial Date on October 14, 1997, and was accordingly on notice of the deadlines contained therein.[3]

The Matters Deemed Admitted

By failing to respond timely to Plaintiff's requests for admissions, the County is deemed to have admitted the matters within them. Fed. R. Civ. P. 36(a). The first request for forty admissions contains, *inter alia*, the following crucial matters:[4]

- Allsbury was at all relevant times a Sergeant in the County police force. (Admis. #4).

- Plaintiff is a County police officer with an excellent employment record and no disciplinary incidents whatsoever. (Admis. #6).

- On March 24, 1995, Plaintiff was working in a plain clothed capacity when he overheard a police radio report that several black males had robbed a store and that County officers were in vehicular pursuit of them. (Admis. #7).

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3. The Assistant County Attorney's only explanation for failing to respond timely to the requests for admissions was that he mistakenly believed that there was only one request for admissions.

4. In setting forth the matters deemed admitted, the Court will omit those portions of the requests for admissions stricken as improper by the Court at pre-trial conference.

Appendix C

- In accordance with his duties and responsibilities, Plaintiff became involved in the vehicular pursuit. (Admis. #8).

- When the suspects left their car, Plaintiff and his partner pursued them on foot. (Admis. #9-10).

- Allsbury had also overheard the radio reports about the suspects. (Admis. #11).

- Believing Plaintiff to be a suspect, Allsbury intentionally aimed his vehicle directly at Plaintiff and struck him with his vehicle. (Admis. #13-14).

- Plaintiff was severely injured and suffered a compound fracture of the leg, knee injuries and back injuries. In addition, Plaintiff was severely scarred psychologically and has suffered a permanent total disability. (Admis. #16).

- After striking Plaintiff, Allsbury stated, "I'm sorry, I thought you were one of the subjects." (Admis. #17),

- The County police force has a practice, policy or custom of allowing police officers to use unnecessary and unreasonable deadly force, including the use of motor vehicles to strike and detain subjects. (Admis. #19).

- Allsbury struck Plaintiff in accordance with this practice, custom, or policy, believing Plaintiff to be a suspect. (Admis. #20).

Appendix C

- Plaintiff was damaged by the use of deadly force by the County police department. (Admis. #21-22).

- Allsbury owed a duty to operate his vehicle in a careful and prudent fashion and, by striking Plaintiff, violated this duty, resulting in damage to Plaintiff. (Admis. #23-25).

- Allsbury used his weapon and deliberately struck detective in a manner exhibiting disregard of human rights or safety, and Plaintiff was damaged by the assault and battery. (Admis. #27-28).

- Plaintiff objected to the practice, policy and custom of the County with regard to the use of unnecessary force and brought attention to the policy at a hearing. (Admis. #30).

- The County has taken personnel action against Plaintiff, resulting in damage to Plaintiff. (Admis. #31).

- Allsbury was not reprimanded or otherwise punished for his decision to run over Plaintiff. (Admis. #4).

- Allsbury struck Plaintiff believing him to be African-American (Admis. #34).

- Plaintiff was severely injured and cannot effectively work. (Admis. #38-39).

Appendix C

The second request for seventy-two admission contains all the crucial matters set forth above with the addition of the following crucial matters:

- The County refuses to approve Plaintiff for the procedure to remove the screws from his ankle. (Admis. #66).

- The County has no policy forbidding officers from using their vehicles to hit suspects and has no written training materials which set forth that it is prohibited for officers to use their vehicles in such a manner. The County does not reprimand officers for using a vehicle in such a manner. (Admis. #46-47, 52).

- The County moved the vehicle from the spot where it stopped before the incident was investigated. (Admis. #49).

- The County has been found previously to have a custom, practice or policy of permitting the unnecessary deadly use of force. (Admis. #53).

- Plaintiff had an outstanding work history and good evaluations prior to the incident. (Admis. #71-72).

- The County pays Plaintiff approximately $30,000.00 less per year than it did before the incident and pays Plaintiff less than officers of equal grade and status. (Admis. #56, 59-60).

- Plaintiff is allowed only light duty, is not granted overtime, and cannot be promoted because of his light duty status. (Admis. #57-58,.60-61).

Appendix C

Pursuant to Rule 36, the County has admitted, *inter alia*, the matters set forth above. "Any matter admitted under this rule is ***conclusively established.***" Fed. R. Civ. P. 36(b) (emphasis added).

The Motion for Summary Judgment and Pre-trial Conference

On January 30, 1998, based on the matters admitted by the County, Plaintiff timely filed his Motion for Summary Judgment. Pursuant to Local Rule 7.1(C), Defendants' response date was February 17, 1998. Rather than responding to Plaintiff's very serious motion, the Assistant County Attorney elected to file a Motion for Extension of Time on February 17th. The Court granted Defendants an extension of time until February 19, 1998, the day before pre-trial conference. The Assistant County Attorney filed the response the morning of pre-trial conference (and had it backdated to the night box on February 19th) and mailed the response to Plaintiff's counsel on February 19, 1998. As a result, the Court file did not contain a copy of the response on the morning of pre-trial conference on February 20, 1998. Although the Assistant County Attorney arrived approximately thirty minutes late for pre-trial conference and the Court file did not contain a copy of Defendants' response, the Court nonetheless received a copy of the response from the Assistant County Attorney and entertained oral argument from both parties on the summary judgment motion. Defendants' three-page response relies solely on the untimely responses to the requests for admissions. The response is devoid of any other evidence contesting the matters conclusively established by the admissions.

Appendix C

The Basis for Granting Summary Judgment

Based on the matters established conclusively by the admissions and the lack of any evidence contradicting them, the Court finds that there remain no genuine issues of material fact as to whether Defendants are liable for Plaintiff's injuries. Accordingly, summary judgment in favor of Plaintiff as to liability is warranted. *See U.S. v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (reversing district court for failure to give binding and conclusive effect to unanswered requests for admissions and observing that Rule 36, "is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect"). The Court notes that the evidence in the record conclusively establishes Allsbury's liability as well as the County's liability. Although the admissions by the County are not the same as if Allsbury, himself, had admitted the matters, *see Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565, 566 (11th Cir. 1987) (finding that admissions of co-defendant could not be applied to defendant where defendant had himself timely answered admissions), they are the equivalent of testimony by the County as to the matters admitted. *See* C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2264, at p. 741 (1970) ("Admissions obtained under Rule 36 may be offered in evidence at the trial of the action"); *Ark-Tenn Distrib. Corp. v. Breidt*, 209 F.2d 359 (3d Cir. 1954). Thus; the admissions constitute conclusive evidence in the record that Plaintiff's version of events actually occurred. The Assistant County Attorney failed to object in any manner to the presentation of the County's admissions as evidence against Allsbury. In addition, the Assistant County Attorney failed to provide

the Court with any evidence whatsoever to contradict the matters admitted by the County. As a result, the only evidence presented to this Court at the summary judgment stage clearly established Allsbury's liability for Plaintiff's injuries. *See Lundquist v. United States*, 116 F.3d 1486 (9th Cir. 1997) (finding admissions of co-party could be used against party where party failed to object to the introduction of the admissions as evidence). Consequently, given the evidence presented to the Court during summary judgment proceedings, the grant of summary judgment is applicable to Allsbury as well as the County.

While the Court is cognizant that, at the summary judgment stage, the Court must view the evidence in the light most favorable to the non-movant, Defendants have simply failed to present any evidence that the Court could view in a favorable light. The Court therefore concludes that, based on the substance of the unanswered admissions and the utter absence of any contradicting evidence, Plaintiff's Motion for Summary Judgment on the liability of both the County and Allsbury will be granted.

Conclusion

The Court finds that no material issues of fact remain as to Defendants' liability for Plaintiff's injuries. Accordingly, after careful review of the record, and the Court being otherwise fully advised; it is

ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment be, and the same is hereby, GRANTED as to liability only. It is further

Appendix C

ORDERED and ADJUDGED that summary judgment as to liability be, and the same is hereby, ENTERED in favor of Plaintiff and against Defendants Metropolitan Dade County and William Allsbury. It is further

ORDERED and ADJUDGED that the above-styled case be, and the same is hereby, SET for TRIAL on damages only on the two week calendar commencing April 20, 1998, with calendar call scheduled for 2:00 p.m. on April 16, 1998, at the James Lawrence King Federal Justice Building, 99 N.E. 4th Street, Eleventh Floor, Courtroom #2, Miami, FL. It is further

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 8th day of April, 1998.

s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED APRIL 8, 1998 AND FILED APRIL 9, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 97-1915-CIV-KING

MICHAEL PEREZ,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY,
and WILLIAM ALLSBURY,

Defendants.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND STRIKING DOCUMENTS

THIS CAUSE comes before the Court upon Defendants Metropolitan Dade County's ("County") and William Allsbury's ("Allsbury") Motion to Amend or Withdraw Admissions, Clarify and Vacate and Request for Hearing on the same, filed February 26, 1998; Allsbury's Objection to Oral Ruling and Motion to Vacate and/or Clarify, filed February 26, 1998; and Defendants' Motion for Reconsideration, filed March 3, 1998. Plaintiff filed a response on March 11, 1998, and Defendants filed a reply on March 20, 1998.

Appendix D

The Court will outline the relevant series of events leading up to the Court's grant of summary judgment as to liability in favor of Plaintiff:

The Rules Setting Forth the Time Frame

The time for responding to requests for admissions, discovery requests, and motions is set forth in the Federal Rules of Civil Procedure, the Local Rules of the Southern District of Florida, and this Court's Order Setting Pre-trial Conference and Trial Date, entered October 14, 1997. Rule 36(a) of the Federal Rules of Civil Procedure provides that matters set forth in a request for admissions are deemed admitted unless "the party to whom the request is directed serves upon the party requesting the admission, a written answer" within "30 days after service of the request." The Order Setting Pre-Trial Conference and Trial Date sets pre-trial conference for 9:30 a.m. on February 20, 1998, and provides that all motions must be filed twenty days prior to pre-trial conference, all responses must be filed two days before pre-trial conference, all discovery must be completed five days prior to pre-trial conference, and a pre-trial stipulation must be filed five days before pre-trial conference. The Order specifically states that "the parties shall abide by the following time schedule under penalty of dismissal or other sanctions." Rule 16.1 of the Local Rules of Court for the United States District Court of the Southern District of Florida provides that the parties are bound by the deadlines set forth in the Order Setting Pre-Trial Conference and Trial Date. Finally, Rule 7.1(C) of the Local Rules provides that "[e]ach party opposing a motion shall serve an opposing memorandum of law not later than ten days after service of the motion."

Appendix D

The Untimely Answered Requests for Admissions

On June 25, 1997, Plaintiff's counsel served the Assistant County Attorney, who represents both the County and Allsbury, the summons and Complaint accompanied by a request for forty admissions from the County ("first request"). That request displays the same file stamp by the Clerk of Court as the original Complaint, civil cover sheet, and summons. (P.'s Mot. for Summ. J., Exh. 1 at 1). The. Assistant County Attorney failed to answer the first request for admissions within thirty days. On October 3, 1997, Plaintiff's counsel served the Assistant County Attorney with a Request to Produce, a Notice of Taking Depositions, and a Request for seventy-two admissions from the County ("second request"). The Certificate of Service attached to the discovery requests is clearly dated October 3, 1997. (P.'s Mot. for Summ. J., Exh. 2 at 8). The Assistant County Attorney failed to produce the requested documents within thirty days, did not produce the witnesses for the scheduled depositions, and failed to respond to the second request for admissions within thirty days. On January 6, 1998, Plaintiff's counsel re-served the October 3rd discovery requests, including the second request for admissions. The second request for admissions is stamped "Received by Dade County Attorney, January 6, 1998." On February 3, 1998, the Assistant County Attorney finally responded to the first request for admissions, over six months after it was served.[1] In that response, the

1. The Response consists of a one and one-half page document. At pre-trial conference the Court found several of the responses violated Rule 36(a)'s provision that "[a]n answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to

(Cont'd)

Assistant County Attorney stated that he received the first request on January 6, 1998. (County's Resp. to Req. for Admis. at 1). However, nothing in the record indicates that the first request for admissions was served on any other date but June 25, 1997. On February 19, 1998, without having petitioned the Court for an extension of time, the Assistant County Attorney untimely responded to the second request for admissions.[2] (Defs.' Resp. to Mot for Summ. J., Exh.2 at 1). The Assistant County Attorney filed these responses with the Clerk of Court on February 20, 1998, the morning of pre-trial conference (the Clerk's office backdated the response as filed in the night box on February 19, 1998), and mailed the responses to Plaintiff's counsel on February 19, 1998. Thus, in addition to being untimely, the late-filed answers violated the Court's Order requiring the completion of discovery five days before pre-trial conference. The Assistant County Attorney had been sent a copy of the Order Setting Pre-trial Conference and Trial Date on October 14, 1997, and was accordingly on notice of the deadlines contained therein.[3]

(Cont'd)
enable the party to admit or deny." Fed. R. Civ. P. 36(a). Consequently, even if the Court deemed the response to be timely, which it does not, the County still would have admitted requests 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 17, 18, and 37.

2. This Response also consists of a one and one-half page document. The response does not specifically deny each request and set forth the reasons for the denial. *See* Fed. R. Civ. P. 36(a) ("The answer shall specifically deny the matter . . . A denial shall fairly meet the substance of the requested admission."). Rather, the response sets forth a group of numbers and states that they are denied.

3. The Assistant County Attorney's only explanation for failing to respond timely to the requests for admissions was that he mistakenly believed that there was only one request for admissions.

Appendix D

The Matters Deemed Admitted

By failing to respond timely to Plaintiff's requests for admissions, the County is deemed to have admitted the matters within them. Fed. R. Civ. P. 36(a). The first request for forty admissions contains, *inter alia*, the following crucial matters:[4]

- Allsbury was at all relevant times a Sergeant in the County police force. (Admis. #4).

- Plaintiff is a County police officer with an excellent employment record and no disciplinary incidents whatsoever. (Admis. #6);

- On March 24, 1995, Plaintiff was working in a plain clothed capacity when he overheard a police radio report that several black males had robbed a store and that County officers were in vehicular pursuit of them. (Admis. #7).

- In accordance with his duties and responsibilities, Plaintiff became involved in the vehicular pursuit. (Admis. #8).

- When the suspects left their car, Plaintiff and his partner pursued them on foot. (Admis. #9-10).

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4. In setting forth the matters deemed admitted, the Court will omit those portions of the requests for admissions stricken as improper by the Court at pre-trial conference.

Appendix D

- Allsbury had also overheard the radio reports about the suspects. (Admis. #11).

- Believing Plaintiff to be a suspect, Allsbury intentionally aimed his vehicle directly at Plaintiff and struck him with his vehicle. (Admis. #13-14).

- Plaintiff was severely injured and suffered a compound fracture of the leg, knee injuries and back injuries. In addition, Plaintiff was severely scarred psychologically and has suffered a permanent total disability. (Admis. #16).

- After striking Plaintiff, Allsbury stated, "I'm sorry, I thought you were one of the subjects." (Admis. #17).

- The County police force has a practice, policy or custom of allowing police officers to use unnecessary and unreasonable deadly force, including the use of motor vehicles to strike and detain subjects. (Admis. #19).

- Allsbury struck Plaintiff in accordance with this practice, custom, or policy, believing Plaintiff to be a suspect. (Admis. #20).

- Plaintiff was damaged by the use of deadly force by the County police department. (Admis. #21-22).

- Allsbury owed a duty to operate his vehicle in a careful and prudent fashion and, by striking Plaintiff, violated this duty, resulting in damage to Plaintiff. (Admis. #23-25).

Appendix D

- Allsbury used his weapon and deliberately struck detective in a manner exhibiting disregard of human rights or safety, and Plaintiff was damaged by the assault and battery. (Admis. #27-28).

- Plaintiff objected to the practice, policy and custom of the County with regard to the use of unnecessary force and brought attention to the policy at a hearing. (Admis. #30).

- The County has taken personnel action against Plaintiff, resulting in damage to Plaintiff. (Admis. #31).

- Allsbury was not reprimanded or otherwise punished for his decision to run over Plaintiff. (Admis. #4).

- Allsbury struck Plaintiff believing him to be African-American (Admis. #34).

- Plaintiff was severely injured and cannot effectively work. (Admis. #38-39).

The second request for seventy-two admission contains all the crucial matters set forth above with the addition of the following crucial matters:

- The County refuses to approve Plaintiff for the procedure to remove the screws from his ankle. (Admis. #66).

- The County has no policy forbidding officers from using their vehicles to hit suspects and has no written training materials which set forth that it is prohibited for officers

to use their vehicles in such a manner. The County does not reprimand officers for using a vehicle in such a manner. (Admis. #46-47, 52).

- The County moved the vehicle from the spot where it stopped before the incident was investigated. (Admis. #49).

- The County has been found previously to have a custom, practice or policy of permitting the unnecessary deadly use of force. (Admis. #53).

- Plaintiff had an outstanding work history and good evaluations prior to the incident. (Admis. #71-72).

- The County pays Plaintiff approximately $30,000.00 less per year than it did before the incident and pays Plaintiff less than officers of equal grade and status. (Admis. #56, 59-60).

- Plaintiff is allowed only light duty, is not granted overtime, and cannot be promoted because of his light duty status. (Admis. #57-58, 60-61).

Pursuant to Rule 36, the County has admitted, *inter alia*, the matters set forth above. "Any matter admitted under this rule is ***conclusively established***." Fed. R. Civ. P. 36(b) (emphasis added).

Appendix D

The Motion for Summary Judgment and Pre-trial Conference

On January 30, 1998, based on the matters admitted by the County, Plaintiff timely filed his Motion for Summary Judgment. Pursuant to Local Rule 7.1(C), Defendants' response date was February 17, 1998. Rather than responding to Plaintiff's very serious motion, the Assistant County Attorney elected to file a Motion for Extension of Time on February 17th. The Court granted Defendants an extension of time until February 19, 1998, the day before pre-trial conference. The Assistant County Attorney filed the response the morning of pre-trial conference (and had it backdated to the night box on February 19th) and mailed the response to Plaintiff's counsel on February 19, 1998. As a result, the Court file did not contain a copy of the response on the morning of pre-trial conference on February 20, 1998. Although the Assistant County Attorney arrived approximately thirty minutes late for pre-trial conference and the Court file did not contain a copy of Defendants' response, the Court nonetheless received a copy of the response from the Assistant County Attorney and entertained oral argument from both parties on the summary judgment motion. Defendants' three-page response relies solely on the untimely responses to the requests for admissions. The response is devoid of any other evidence contesting the matters conclusively established by the admissions. Given the extensive admissions by the County and Defendants' failure to present any independent evidence on their behalf, the crucial issue to the Court became whether Defendants were in actual possession of any evidence that Allsbury did not intentionally run over Plaintiff. The Assistant County

Appendix D

Attorney, in what the Court finds to be a deceptive manner, represented that Allsbury testified in deposition that he did not intentionally run over Plaintiff. In fact, Allsbury had not given a deposition. The transcript of pre-trial conference documents the following exchange:

The Court:	Is there a serious issue left as to whether or not [Allsbury] intended, in the interests of apprehending what he perceived and thought to be a fleeing felon that he was trying to intercept and arrest, grossly, negligently or deliberately ran down the plaintiff?
County Attorney:	Yes.
The Court:	Is there an issue over that in your mind?
County Attorney:	Yes, your Honor.
The Court:	Where does it arise, what are the facts in this record that establishes that?
County Attorney:	Judge, there are depositions; there is deposition testimony that indicates that it was accidental; that was the conclusion of the officer on the scene. That was a statement of Sergeant Allsbury.
The Court:	. . . What else?
County Attorney:	Allsbury's testimony that he did not intend to hit the plaintiff or suspect. He was

attempting to set off a perimeter, to close off avenues of escape for the fleeing suspect. He accidentally lost control of the car and accidentally hit what he thought was a suspect, Mr. Perez. And it was a pure accident. . . .

* * * *

The Court: So what we have is Sergeant Allsbury's testimony that he did not intend to strike the plaintiff with his car. That he was trying to set up a perimeter and there was an accident. That's basically about —

County Attorney: Yes, Judge.

The Court: — the strength of the County's case. All right, Now let me ask counsel — thank you. You can have a seat — I want to know about these depositions or this deposition that was taken. You've indicated that there were eye witnesses or something. What do you have, what's your position?

* * * *

Plaintiff's Counsel: First of all, William Allsbury, defendant being represented by the County, we've noticed his deposition twice. He has yet to show up for deposition.

Appendix D

The Court: He hasn't given a deposition?

Plaintiff's Counsel: William Allsbury has not, the defendant has not shown up.

The Court: I thought he just gave a deposition where he said it was an accident?

Plaintiff's Counsel: No he has not given a deposition, your Honor.

The Court: What's this all about? What just a minute. Now, please, what is this all about? His deposition has not been taken?

County Attorney: We've agreed to reschedule it.

The Court: It's a yes or no or I don't know. Has his deposition been taken?

County Attorney: No, your Honor.

The Court: Why did you tell me what he testified to? You left me with the clear impression that his deposition had been taken, that he had sworn under oath, he had answered certain questions, and he had told us what he was doing. You just told me that.

(Tr. of Pre-Trial Conf. at 18-22, attached as Appendix A).

Appendix D

Based on the matters established conclusively by the admissions and the lack of any evidence contradicting them, the Court granted summary judgment in favor of Plaintiff as to liability only and set trial for damages. *See U.S. v. 2204 Barbara Lane*, 960 F.2d 126, 129 (11th Cir. 1992) (reversing district court for failure to give binding and conclusive effect to unanswered requests for admissions and observing that Rule 36 "is designed to expedite litigation, and it permits the party securing admissions to rely on their binding effect").[5]

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5. The documents filed by the parties after pre-trial conference reveal further deceptive behavior on the part of the Assistant County Attorney. Although the Court will strike the deposition of William Allsbury from the record, the Court will use it here only to highlight the misleading manner in which the Assistant County Attorney litigated this case. The Assistant County Attorney asserted in the Notice of Filing Affidavit of William Allsbury, filed March 2, 1998, that "Defendants' Counsel has recently discovered the present address and phone number of retired Officer William Allsbury." The deposition of William Allsbury, taken on March 16, 1998, however, reveals the following:

Plaintiff's Counsel:	How long have you resided [at your house]?
Allsbury:	Since May 1 of last year.
Plaintiff's Counsel:	Is that upon your retirement from the Metro-Dade Police Department?
Allsbury:	Yes, sir.

* * * *

Plaintiff's Counsel:	Do you receive correspondence from the [Metro-Dade police] department?

(Cont'd)

Appendix D

(Cont'd)

Allsbury:	Yes, sir, I have.
Plaintiff's Counsel:	At that address?
Allsbury:	Yes, sir, I have.
Plaintiff's Counsel:	So the Metro-Dade Police Department has the address?
Allsbury:	Yes, sir, they do.
Plaintiff's Counsel:	Do they have your telephone number?
Allsbury:	Yes, sir, they do.
Plaintiff's Counsel:	When did Metro-Dade County or its attorneys first get in touch with you about this litigation?
Allsbury:	I don't know the exact date. It was towards the end of February . . . .

* * * *

Plaintiff's Counsel:	Were you told that your deposition had been noticed on three prior occasions?
Allsbury:	No, sir.
Plaintiff's Counsel:	When you retired, I think I asked you earlier whether the County had your address and telephone number, when you retired did you fill out forms that would give the county your address and telephone number?
Allsbury:	Well, yeah, I filled out my deferred income form. They would have had it there.

(Allsbury Dep. at 6-7, 12-13).

Appendix D

Motions for Reconsideration

After pre-trial conference, Defendants filed various motions to amend, vacate or clarify, and reconsider. The Court will treat these motions as motions for reconsideration of the Court's Order Granting Summary Judgment and consider only the portions of the motions properly seeking reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[6]

First, the Assistant County Attorney contends that Allsbury's whereabouts is "newly discovered," warranting reconsideration. As the Court observed in footnote 5, *supra*, this argument is completely disingenuous. The County police force as well as the County itself was in possession of

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6. Rule 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Allsbury's address and phone number. With even a minimal amount of effort, the Assistant County Attorney could have gotten in touch with his own client. The fact that he failed to do so is hardly grounds for reconsideration.

Next, Allsbury asserts that the Court's grant of summary judgment should not apply to him because it was based on admissions by the County. Pursuant to Rule 36(b), however, the matters admitted by the County are "conclusively established." Fed. R. Civ. P. 36(b). It is true that the admissions by the County are not the same as if Allsbury, himself, had admitted the matters. *See Riberglass, Inc. v. Techni-Glass Indus., Inc.*, 811 F.2d 565, 566 (11th Cir. 1987) (finding that admissions of co-defendant could not be applied to defendant where defendant had himself timely answered admissions). The admissions do, however, become the equivalent of testimony by the County as to the matters admitted and thus constitute conclusive evidence in the record that Plaintiff's version of events actually occurred. *See* C. Wright and A. Miller, Federal Practice and Procedure: Civil § 2264, at p. 741 (1970) ("Admissions obtained under Rule 36 may be offered in evidence at the trial of the action"); *Ark-Tenn Distrib. Corp. v. Breidt*, 209 F.2d 359 (3d Cir. 1954). The Assistant County Attorney failed to object in any manner to the presentation of the County's admissions as evidence against Allsbury. In addition, the Assistant County Attorney failed to provide the Court with any evidence whatsoever to contradict the matters admitted by the County. As a result, the only evidence presented to this Court at the summary judgment stage clearly established Allsbury's liability for Plaintiff's injuries. *See Lundquist v. United States*, 116 F.3d 1486 (9th Cir. 1997) (finding admissions of co-party

could be used against party where party failed to object to the introduction of the admissions as evidence). Consequently, given the evidence presented to the Court during summary judgment proceedings, the grant of summary judgment is applicable to Allsbury as well as the County.

Finally, the motions are based largely on allegations contained in a sealed document involving very sensitive facts about the Assistant County Attorney's personal problems. While the Court is certainly sympathetic to the Assistant County Attorney's very tragic and distressful situation, it simply does not justify his utter neglect of this case and flagrant disregard for the Federal Rules of Civil Procedure for over seven months. Like other attorneys who suffer sudden personal problems during the pendency of a case, the Assistant County Attorney could have easily asked the Court for a continuance of the case. In addition, the sealed document indicates that these problems have been on-going for some time. Thus, the Assistant County Attorney could and should have told his superiors that he was not in a condition to handle this case. However, the Assistant County Attorney informed the Court and his superiors for the first time of his apparent inability to litigate this case only after the Court granted summary judgment in favor of Plaintiff. Again, although the Court sympathizes with the Assistant County Attorney, he has not provided an adequate excuse for totally ignoring this case for over seven months. Consequently, the Court will not reconsider its grant of summary judgment as to liability in favor of Plaintiff.

As a final note, although the Court granted summary judgment at pre-trail conference and the time for pre-trial

motion practice is long over, the parties continue to file pre-trial motions and continue to engage in discovery. The Order Setting Pre-Trial Conference and Trial Date clearly states that all motions must be filed twenty days prior to pre-trial conference and all discovery must be completed five days prior to pre-trial conference. Consequently, the Court will strike from the record all docket entries except for the motions for reconsideration and the responses thereto.

Accordingly, after careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendants' Request for Hearing be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that Defendants' Motion to Amend or Withdraw Admissions, Clarify and Vacate be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that Defendants' Motion for Reconsideration be, and the same is hereby, DENIED. It is further

ORDERED and ADJUDGED that Defendant William Allsbury's Objection to Oral Ruling and Motion to Vacate and/or Clarify be, and the same is hereby, DENIED. It is further

Appendix D

ORDERED and ADJUDGED that the following documents be, and the same are hereby, STRICKEN from the record:

1. D.E. 31 - Defendants' Notice of Filing Affidavit of William Allsbury

2. D.E. 32 - Plaintiff's Notice of Filing Amended Witness List

3. D.E. 34 - Defendant's Amended Witness List

4. D.E. 35 - Plaintiff's Motion to Strike

5. D.E. 36 - Plaintiff's Motion for Protective Order

6. D.E. 38 - Defendant's Amended Witness List

7. D.E. 39 - Plaintiff's Notice to Take Deposition of Thomas Natiello

8. D.E. 40 - Plaintiff's Re-Notice to Take Deposition of Thomas Natiello

9. D.E. 41 - Plaintiff's Re-Notice to Take Deposition of Lt. Harvy Honig

10. D.E. 42 - Parties' Agreed Notice to Take Deposition of William Allsbury

11. D.E. 45 - Defendants' Motion for Continuance to Obtain Expert Services

Appendix D

12. D.E. 46 - Defendants' Notice of Filing Excerpt of Deposition of William Allsbury

13. D.E. 47 - Defendants' Notice of Filing Deposition of Director Carlos Alvarez

14. D.E. 48 - Defendants' Notice of Filing Depositions in Support of Defendant's Motion for Reconsideration

15. D.E. 49 - Defendant's Notice of Filing Deposition of William Allsbury

16. D.E. 50 - Deposition of William Allsbury

17. D.E. 51 - Defendant's Response to Motion to Strike

18. D.E. 52 - Defendant's Response to Motion for Protective Order

19. D.E. 54 - Plaintiff's Response to Motion for Continuance

20. D.E. 55 - Defendant's Motion for Protective Order

21. D.E. 56 - Plaintiff's Reply in Support of Motion for Protective Order

22. D.E. __ - Plaintiff's Reply Memorandum in Support of His Motion to Strike Affidavit of Defendant William Allsbury.

Appendix D

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 8th day of April, 1998.

s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Peter W. Bellas, Esq.
John E. Kirkpatrick, Esq.
Eric K. Gressman, Esq.

Appendix D

Appendix A

[Omitted here but submitted separately as Lodging]

APPENDIX E — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED MAY 27, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO: 97-1915-CIV-KING
MAGISTRATE JUDGE GARBER

MICHAEL PEREZ,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY FLORIDA,

Defendant.

FINAL JUDGMENT

This action came on for trial before the Court and a jury, Honorable James Lawrence King, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is **ORDERED** and **ADJUDGED**

1. That the Plaintiff, Michael Perez, recover of the Defendant, Metropolitan Dade County, Florida, n/k/a, Miami-

Appendix E

Dade County, Florida the sum of $5,700,000.00, with interest thereon at the rate of 5.407 percent as provided by law, and his attorneys' fees and costs.

2. The Court reserves jurisdiction to award Plaintiff attorneys' fees and costs as well any other relief that may be just and proper upon motion of Plaintiff.

DATED at Miami, Florida this 27 day of May, 1998.

/s/ JAMES LAWRENCE KING
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER SETTING PRE-TRIAL CONFERENCE AND TRIAL DATE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED OCTOBER 14, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 97-1915-CIV-KING

MICHAEL PEREZ,

Plaintiff,

vs.

METROPOLITAN DADE COUNTY
and WILLIAM ALSBURY,

Defendants.

ORDER SETTING PRE-TRIAL CONFERENCE AND TRIAL DATE

The above-styled cause is hereby set for pre-trial conference on February 20, 1998, at 9:30 a.m., at the James Lawrence King Federal Justice Building, 99 N.E. 4th Street, Eleventh Floor, Courtroom #2, Miami, Florida. Pursuant to Local Rule 16.1 of this court the parties shall abide by the following time scheduled under penalty of dismissal or other sanctions:

TWENTY days prior to PTC: ***ALL*** motions must be filed. Any outstanding motions will be ruled on at pre-trial conference.

Appendix F

TWO days prior to PTC: ***ALL*** responses to motions must be filed

TEN days prior to PTC: attorneys must meet

SEVEN days prior to PTC: Resume of experts' reports must be exchanged

FIVE days prior to PTC: ***ALL*** discovery must be completed

FIVE days prior to PTC: ***PRE-TRIAL STIPULATION MUST BE FILED and a courtesy copy must be provided to chambers. Please notify chambers at 536-5364 of any settlement of the case.***

It is further

ORDERED and ADJUDGED that this case is hereby set for trial on the trial calendar commencing March 23, 1998. In order to make sure that cases set on this calendar are completely ready for trial and that all matters which might be a cause of delay of the trial have been ruled upon, the court hereby schedules a calendar call for March 19, 1998, at 2:00 p.m., at the James Lawrence King Federal Justice Building, 99 N.E. 4th Street, Eleventh Floor, Courtroom #2, Miami, Florida.

Under existing policies and agreements between the state and federal courts of Florida, the judge who enters the first written order scheduling a case for trial on a date set, has priority over the service of the attorney so scheduled for the date set. *See Krasnow v. Navarro*, 909 F.2d 451 (11th Cir. 1990).

Appendix F

It shall be the duty of the attorneys herein set to ensure that no other judge schedules them for a trial that impacts upon or conflicts with the date set forth above. If any counsel receives a written notice of a trial from another judge, in either state or federal court, that in any way conflicts with this trial scheduled setting, it is the obligation of that attorney to notify that judge immediately so that the judge may reschedule his or her calendar, thus leaving counsel conflict free for this case.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building, Miami, Florida, this 14th day of October 1997.

s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA